(1)

No. 91-637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAMS TILE & TERRAZZO COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MCNEILL STOKES
Counsel of Record

FRANKEL, HARDWICK, TANENBAUM
& FINK, P.C.
Suite 400
359 East Paces Ferry Road
Atlanta, Georgia 30305
(404) 266-2930

Attorney for the Petitioner

Lex Publishing Company, 2161 Monroe Dr., Atlanta, Georgia 30324 (404) 875-5140

QUESTIONS PRESENTED

1. Should the NLRB be held to apply precedent-setting interpretation of the law in *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1389 (1987) which held that a construction industry employer may repudiate an expired pre-hire bargaining agreement because the NLRB announced it would apply *Deklewa* to all pending cases at whatever stage.

2. Did the NLRB follow its own test by evaluating whether the employers could conclusively demonstrate whether the union lost majority status and not considering that the employers had a good-faith doubt of the union's continued majority support which was founded on overwhelming objective evidence.

3. Did the NLRB abuse its discretion in refusing to infer that striker replacement workers who constituted a majority of the bargaining unit and who crossed a particular union's picket line would generally reject that union as their bargaining representative therefore providing sufficient objective evidence of the employers' good-faith doubt that the union lacked majority status.

LIST OF INTERESTED PARTIES

The following were parties to the proceeding in the Eleventh Circuit Court of Appeals:

National Labor Relations Board, (Respondent) (hereinafter "Board" or "NLRB"); The Tile, Terrazzo & Marble Contractors Association of Atlanta & Vicinity (hereinafter "Association") and its members; Williams Tile & Terrazzo Company (hereinafter "Williams") and U. S. Mosaic Tile Company (hereinafter "Mosaic")(hereinafter collectively known as "Employers"). *

* The Petitioner Williams Tile & Terrazzo Company has no parent or subsidiary companies.

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OPINIONS BELOW

The Decision of the Eleventh Circuit Court of Appeals sought to be reviewed in this case is reported at 935 F.2d 1249 (1991) and is reproduced in its entirety at page 1a in the Appendices to this Petition.

The Decision and Order of the National Labor Relations Board and the findings of the Administrative Law Judge Howard I. Grossman (hereinafter the "ALJ") are published at 287 N.L.R.B. No. 79 (March 25, 1987) and are reproduced in their entirety beginning at pages 25a and 39a respectively in the Appendices to this Petition.

The Response and denial of the National Labor Relations Board to the Employers' Motion for Reconsideration is reproduced in its entirety beginning at page 39a in the Appendices to this Petition.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Eleventh Circuit Court of Appeals was entered on July 17, 1991. This Petition has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS INVOLVED*

29 U.S.C. § 152(3)
29 U.S.C. § 158(a)(1)
29 U.S.C. § 158(a)(3)
29 U.S.C. § 158(a)(5)
29 U.S.C. § 158(f)
29 U.S.C. § 159(a)

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* The pertinent text of these cited statutes is set out verbatim in the appended materials.

STATEMENT OF CASE

Williams Tile & Terrazzo Company (hereinafter "Williams") and U.S. Mosaic Tile Company, Inc. (hereinafter "Mosaic") (hereinafter collectively known as the "Employers") are Georgia corporations engaged in the installation of tile, terrazzo, marble and slate. In 1983 Williams and Mosaic and other construction industry employers formed the Tile, Terrazzo & Marble Contractors Association of Atlanta & Vicinity (hereinafter the "Association"). In 1983 the Association entered into a two-year pre-hire bargaining agreement with Tile, Marble & Terrazzo Finishers and Shopmen, Local 167 (hereinafter the "Union"). Subsequently, Williams and Mosaic were left as the only remaining members of the Association.

In August in 1985, the Union and the Association began negotiations for a new bargaining agreement in anticipation of the expiration of the existing agreement on September 30, 1985. From August until November, the parties met approximately nine (9) times. (Appendix, p. 45a) Unable to reach an agreement on the issue of wages, the Union began a strike, and employees walked off the job on November 19, 1985. (Appendix, p. 46a) Subsequently, the Employers discontinued making fringe benefit contributions to the Union's pension, health, welfare, vacation and promotional funds under the expired agreement. (Appendix, p. 46a)

An overwhelming majority of the strikers returned to work within days after the strike began.[1] The remaining employees continued their strike activity for approximately one month, until December 20, 1985. On that date the Union's business manager informed the Association, by letter, that all employees were offering to return to work.[2] The number of employees in the bargaining unit at the time the strikers returned to work is the subject of much dispute. However, viewing the Board's determinations in their most favorable light, there were 118 employees in the bargaining unit on the date of nonrecognition.[3] Of these 118 employees, 18 were strikers seeking to return to work and 61 were strike replacements.[4]

The Union filed Unfair Labor Charges against the Association and its members, Williams and Mosaic, alleging violations of sections 8(a)(1), (3) and (5) of the

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[1] Fifty-five (55) of a total of sixty-nine (69) striking employees returned to work by November 24, 1985, only five (5) days after the strike began. (Appendix, p. 47a)

[2] The Union's December 20th letter to the Employers set out in its entirety below:
This letter is to officially inform you that all employees make an unconditional offer to return to work. The Union is prepared to accept your final offer and to recommend it to membership for ratification. It is understood that the final offer is Nine Dollars ($9.00) per hour, plus eighty-six cents ($.86) in fringe benefits. It is further understood that the current pay difference per hour with a Tile or Marble Finisher or base machine operator is to remain in effect. All other items were previously agreed and it is our contention that we now have a contract which should be reduced to writing for signature. (Appendix, p. 52a-53a)

[3] See discussion of Section III, *infra*.

[4] *Id.*

National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* (hereinafter the "Act"). A hearing on the allegations in the Complaint was held on August 28th and September 29th through 30th, 1987 before the Honorable Howard I. Grossman, Administrative Law Judge (hereinafter the "ALJ"). On March 25, 1987 the ALJ issued his findings and conclusions. He determined that the Employers had committed three (3) separate violations of the Act. Specifically, the ALJ determined that the Employers had violated:

> (1) Sections 8(a)(1) and (5) of the Act by refusing to bargain with the Union after receiving its offer to return to work (Appendix, p. 92a-94a);
>
> (2) Sections 8(a)(1) and (5) of the Act by unilaterally ceasing to make contributions to the Union's fringe benefits fund (Appendix, p. 94a-97a); and
>
> (3) Section 8(a)(1) and (3) of the Act by refusing to reinstate or offer reinstatement to the remaining strikers (Appendix, p. 81a-84a)

Exceptions to the ALJ's findings and conclusions were filed by the General Counsel and by the Employers on May 1, 1987. The Union filed a Brief and Response to the Employers exceptions on May 26, 1987. On December 16, 1987, the Board issued its Decision and Order, affirming the ALJ's findings and conclusions, and adopting the ALJ's recommended order as modified. (Appendix, p. 25a *et seq.*)

On February 27, 1987, one year after the initial charges were lodged against the Employers and five months after the hearing before the ALJ, the Board

announced an abrupt departure from its previous interpretation of the law regarding construction industry pre-hire agreements. *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375 (1987) *enforced sub nom. Int'l Assn. of Bridge, Structural and Ornamental Iron Workers Local No. 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988) *cert. denied* 408 U.S. 889 (1987). *Deklewa* recognized the right of a construction industry employer to lawfully repudiate an expired pre-hire bargaining agreement. The Board expressly stated that it would apply the *Deklewa* opinion to "all pending cases in whatever stage." *Deklewa*, 282 N.L.R.B. at 1389.

The Employers filed a Motion for Reconsideration on January 28, 1988 requesting the Board to reconsider the Unfair Labor Practice charges in light of *Deklewa*. Responses to the Employers' Motion for Reconsideration were filed by the Union on February 12, 1988 and by General Counsel on February 18, 1988 and the Employers replied thereto on March 4, 1988. Despite the Board's own express mandate that *Deklewa* should be applied to all pending cases at whatever stage[5], the Board issued an Order on April 20, 1990 denying the Employers' Motion for Reconsideration on the basis that the *Deklewa* defense was time-barred. At the time of filing the Motion for Reconsideration, the present case was still within the jurisdiction of the Board. Because the Motion for Reconsideration raising *Deklewa* was before the Board, the Board should have followed its own edict to apply *Deklewa* to all its pending cases "in whatever stage."

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[5] *Deklewa*, 282 N.L.R.B. at 1389.

On June 28, 1990, Mosaic filed a Petition for Review of the Board's decision in the United States Court of Appeals for the Eleventh Circuit (hereinafter the "lower court"). On August 1, 1990 Williams sought to join Mosaic in filing a Petition of Review. On August 13, 1990 the Board filed a Cross-Application for enforcement of the National Labor Relations Board. On July 17, 1991 the lower court issued an opinion enforcing the Board's Order. Specifically, the lower court held that the Board did not abuse its discretion by refusing to apply *Deklewa* despite the Board's previous mandate that *Deklewa* should be applied to all pending cases at whatever stage. The lower court further held that the Employers committed an unfair labor practice when they withdrew recognition from the Union based on their good-faith belief that the Union had lost majority status.

EXISTENCE OF JURISDICTION

The Eleventh Circuit Court of Appeals had jurisdiction over this matter pursuant to 29 U.S.C. § 160(e).

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

The Employers lawfully repudiated the expired pre-hire bargaining agreement with the Union pursuant to the principles enunciated by the Board in *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375 (1987), *enforced sub nom. Int'l Assn. of Bridge, Structural and Ornamental Iron Workers Local No. 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988) *cert. denied* 408 U.S. 889 (1988). *Deklewa* was decided after the hearing before the ALJ. The Board abused its discretion in denying the Employers' Motion for Reconsideration which urged that the Board apply the precepts that it set forth in *Deklewa* to the present case. Reconsideration was urged in light of the Board's own pronouncement that *Deklewa* should be applied to "all pending cases in whatever stage." *Deklewa*, 282 N.L.R.B. at 1389. The present case was still within the jurisdiction of the Board and the Motion for Reconsideration was timely and proper so as to comport with the Board's mandate to apply the sweeping changes it announced in *Deklewa* to "all pending cases in whatever stage." It is fundamental that an independent agency of the United States government should follow its own announced mandates, particularly one as dramatic as the Board's change announced in *Deklewa* which allowed construction industry employers to repudiate a pre-hire bargaining agreement upon its expiration without any subsequent duty to bargain with the signatory union.

Further, notwithstanding the applicability of *Deklewa*, the Board erred in determining that the

Employers illegally refused to bargain with the Union when the Employers objectively demonstrated a good-faith doubt as to the Union's continued majority support. The Board failed to apply its own mandate, as recognized by this Court, that an employer may justifiably withdraw union recognition if said employer has a good faith doubt, founded on a sufficient objective basis, that the particular union has lost majority support among employees. *NLRB v. Curtin-Matheson Scientific, Inc.*, 110 S.Ct. 1542 (1990)(citing *Station KKHI*, 284 N.L.R.B. 1339 (1987)). Pursuant to the Board's own test, an employer need not have *conclusive* evidence of the union's lack of majority support. The employer must only provide sufficient objective evidence which, when considered as a whole, establishes a good faith doubt as to the union's majority status. *Id.* Contrary to the Board's finding, substantial record evidence supports the Employers' objective belief that the Union did not enjoy the workers' majority support. The employees had expressed their dissatisfaction with the Union in a myriad of ways. Eighty percent of strikers returned to work just days after the strike began. (Appendix, p. 47a) As the date of nonrecognition, 28 employees signed a petition stating that they no longer wanted to be represented by the Union. (Appendix, p. 88a, 91a) Other decertification petitions were circulated which subsequently brought the number of employees who stated that they no longer wanted Union representation to 43, and undisputed evidence established that employees had expressed their dissatisfaction with the Union to the Employers. (Appendix, p. 90a) Further, more than one-half of the employees in the bargaining unit, for the purposes of determining

majority status, were replacement workers who had crossed the Union's picket lines. The Employers should be able to infer that a large number, if not all, of these replacements would reject the Union as their bargaining representative.

In sum, the Board has in this case has precluded the ability of an employer to verify its good-faith doubt as to its employees' continued majority support of Union representation. The Board's scrutiny is so unreasonably strict that it is virtually impossible for an employer to demonstrate that it withdrew recognition based upon such doubt.

DISCUSSION

I. THE BOARD ABUSED ITS DISCRETION BY REFUSING TO APPLY *DEKLEWA* TO THE PRESENT CASE DESPITE THE BOARD'S OWN MANDATE TO APPLY *DEKLEWA* RETROACTIVELY TO ALL PENDING CASES AT WHATEVER STAGE.

A. *In Deklewa the Board Abandoned The Presumption That A Signatory Union Continues To Represent A Majority Of Employees After A Section 8(f) Bargaining Agreement Expires.*

By the Board's own pronouncement, *Deklewa* effected a dramatic change in the legal obligations of employers and unions in the construction industry.[6] In

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[6] The Board acknowledged the radical change it propounded in *Deklewa:* "Because . . . flaws permeate the entire existing 8(f) analytic scheme we have determined that minor adjustments or changes to current law would not be sufficient to modify its deficiencies." *Deklewa,* 282 N.L.R.B. at 1380, fn. 16.

order to fully understand the import of *Deklewa,* one must understand how and why the Act excepts the construction industry from its standard rules regarding majority status and pre-hire agreements. Contrary to the laws regarding other industries, section 8(f) of the Act expressly authorizes employers and unions in the construction industry to enter into bargaining agreements before employees are hired and without a demonstration of a union's majority support among employees. 29 U.S.C. § 158(f). These bargaining agreements are commonly known as "pre-hire agreements." This exception was carved out for the construction industry in light of its specific labor needs. For example, prior to bidding on a project, building contractors must be able to calculate their labor costs and they must be able to tap into a ready supply of skilled workers that construction unions can supply. S.Rep., 1 Leg. Hist. 424; *see also* H.Rep., 1 Leg. Hist 777.[7] Section 8(f) enables building and construction industry employers to do future planning that is not necessary for other types of employers.

While *Deklewa* did not alter the Act's section 8(f) exception, it radically changed how section 8(f) was interpreted. Prior to *Deklewa* the Board held that section 8(f) bargaining relationships could be repudiated by any party for any reason until such time as the signatory union obtained majority status. *See R.J. Smith Construction Co.,* 191 N.L.R.B. 693 (1971), *enforced sub nom. Operating Engineers Local 150 v.*

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7 *Deklewa* contains a lengthy discussion of the legislative history behind section 8(f). *Id.* at 1380-82.

NLRB, 480 F.2d 1186 (D.C. Cir. 1973); *NLRB v. Iron Workers Local 103 (Higdon Construction Co.),* 434 U.S. 335 (1978). Once the signatory union gained majority support among the employees in the unit, the relationship would "convert" to a conventional section 9(a) relationship whereby the union would receive a presumption of continuing majority status until such time as the union verifiably lost majority support or the employer had a good faith doubt, based on sufficient objective evidence, that the union retained majority support. *NLRB v. Curtin-Matheson Scientific, Inc.,* 110 S.Ct. 1542 (1990); *Bickerstaff Clay Products, Inc.,* 871 F.2d. 980, 984-985 (11th Cir. 1989 *cert. denied,* 110 S.Ct. 292 (1989).

In practice, pre-*Deklewa* law resulted in a tremendous amount of fact-specific litigation over whether a union had obtained majority status and whether an employer was justified in refusing to bargain with it.[8] In *Deklewa,* however, the Board found it "both necessary and appropriate to abandon the Board's existing interpretation of section 8(f)." *Deklewa,* 282 N.L.R.B. at 1380. Consequently, the Board expressly rejected the conversion doctrine. Instead, it held that a section 8(f) agreement could no longer be repudiated during its term but that either party could repudiate the agreement at its expiration unless either (1) the union had been certified as the employees' majority representative in a Board election or (2) the employer had voluntarily recognized the union based upon an affirmative showing of majority support. *Deklewa,* 282 N.L.R.B. at 1377-78, 1385, 1387 n.5. Finally, in *Deklewa*

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[8] *Deklewa,* 282 N.L.R.B. at 1383-84.

the Board held that the party seeking to assert the existence of a section 9(a) relationship, in this case the Union, carries the burden of proof. *Deklewa,* 282 N.L.R.B. at 1385, n. 41.

In its Decision and Order, the Board affirmed the ALJ's determination that the Employers had violated the Act by refusing to bargain with the Union. The ALJ's conclusions were premised on his finding that the expired collective bargaining agreement raised a presumption that the Union continued to represent a majority of the employees thereby obligating the Employers to bargain with it. The crux of the Board's Decision and Order was its presumption of the Union's majority support, a presumption which the Board had previously abandoned in *Deklewa.*

Deklewa was issued five months after the hearing before the ALJ and one month before the ALJ issued his conclusions and findings. The Board later adopted the conclusions and findings of the ALJ. The Employers moved the Board to reconsider its Decision and Order in light of the Board's new interpretation of section 8(f) under *Deklewa.* Specifically, the Employers urged the Board to reconsider on the grounds that they were engaged in the construction industry[9] and that the agreement with the Union was governed by section 8(f) of the Act. Therefore, pursuant to *Deklewa,* once the pre-hire agreement lapsed, the Employers were free to repudiate it, and, contrary to its Decision and Order, the Board could no longer presume that the Union had

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[9] Employers are in the business of installing marble, slate, tile and terrazzo.

majority status, therefore relieving the Employers of an obligation to bargain with the Union. The Board denied the Motion for Reconsideration — not because it found the precepts of *Deklewa* to be inapplicable. Rather, the Board denied the Motion for Reconsideration on the grounds that the Employers untimely raised the "defense" that the proceedings were governed by the principles of section 8(f) as set forth in *Deklewa.*

B. *The Board Should be Held to Follow its Own Pronouncement that it Would Apply Deklewa to All Pending Cases at Whatever Stage.*

The Board recognized when it issued *Deklewa* that its new interpretation of section 8(f) constituted a radical departure from past precedent. Consequently, the *Deklewa* opinion contains a lengthy discussion of whether its precepts should be applied retroactively. The Board determined that the principles enunciated in *Deklewa* were so important to the fair application of section 8(f) so as to require retroactive application.

> We conclude that the statutory benefits from the announced changes in 8(f) law for employees and employers and unions in the construction industry far outweigh any hardships resulting from the immediate imposition of these changes. *Consequently, we will apply the Board's new 8(f) principles to this case and to all pending cases in whatever stage. (emphasis supplied).*

Deklewa, 282 N.L.R.B. at 1389. In direct contrast to this pronouncement, the Board now takes the position that the Employers' assertion of *Deklewa* was not timely.

Deklewa was raised before the Board on a Motion for Reconsideration. Despite its own mandate that *Deklewa* principles should be applied to "all pending cases in whatever stage," the Board denied the Employers' Motion for Reconsideration on the grounds that the Employers' *Deklewa* argument was time barred. The Board contends that the application of *Deklewa* should have been raised at some point prior to when the Board issued its final Decision and Order. The lower court affirmed the Board's Decision, holding that the Employer's failed to assert a section 8(f) affirmative defense prior to the Motion for Reconsideration, thereby closing the door to any consideration of *Deklewa*.

As noted by the lower court, the Board did little to explain why the Employers' *Deklewa* argument was considered to be an affirmative defense. (Appendix, p. 12a) Consequently, the lower court interpreted that the Board viewed the Employers' assertion of a section 8(f) argument to be an affirmative defense and upheld the Board's decision holding that *Deklewa* may only be retroactively applied if a section 8(f) issue was previously before the Board. In sum, the lower court contends that the Employers confused the distinction between the retroactive application of *Deklewa* and the failure to timely assert an affirmative defense under section 8(f). The lower court's reasoning is flawed because it attempts to separate the Employers' section 8(f) defense from *Deklewa*. The lower court fails to recognize that the agreement in question is indisputably a section 8(f) agreement. The lower court also fails to recognize that the section 8(f) did not become applicable to this particular case until the Board outlined its radically

new interpretation of section 8(f) in *Deklewa*. Consistent with pre-*Deklewa* law, this case was initially a battle over whether the Union had obtained majority status. No section 8(f) issue was implicated in this case until the *Deklewa* opinion was issued. The Employers should not be held liable for failing to foresee that a radical change in the law would occur one year after the case began and five months after the ALJ's hearing.

In an attempt to explain inconsistencies in the Board's present stance on the retroactive application of *Deklewa* with its position in other cases, the lower court cites *Ron E. Savoia Construction Co.*, 289 N.L.R.B. No. 26 (June 17, 1988)(Appendix, p. 16a) As the lower court noted, *Savoia* is also a case involving a construction industry pre-hire agreement which was pending at the time the *Deklewa* opinion issued. *Id.* In *Savoia*, the ALJ issued his decision one month before and exceptions were filed two weeks before the *Deklewa* opinion issued. The Board later, sua sponte, remanded the case to the administrative law judge who originally handled the matter so that *Deklewa* could be applied. In its discussion of *Savoia* the lower court determined that the Board acted within its discretion because the employer in *Savoia* "raised an 8(f) defense in its exceptions." (Appendix, p. 16a)[10] While the lower court claims that *Savoia* can be read to demonstrate a consistency in the Board's position, *Savoia* actually demonstrates that the

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[10] The employer's exceptions in *Savoia* did not mention section 8(f) explicitly. The employer merely stated that it never recognized the union as a bargaining representative and would not do so unless the union were certified. (Appendix, p. 16a) The Board construed this statement as raising a sufficient section 8(f) argument to open the door for the assertion of *Deklewa*.

Board, despite its mandate to apply *Deklewa* to all pending cases, has created a thin and imperceptible line regarding under what circumstances it will or will not apply *Deklewa* retroactively.

For example, the Board determined that the employer in *Savoia* "anticipated" *Deklewa* and raised a section 8(f) defense in their exceptions. This purported section 8(f) defense was nothing more than a single, off-hand reference to section 8(f) concepts. Like the present case, the employer never mentioned section 8(f) explicitly. Like the present case, section 8(f) played no role in the case until the adoption of *Deklewa*. However, this casual reference was sufficient to allow the application of *Deklewa*. Thus, *Savoia* does not demonstrate the Board's consistency in its application of *Deklewa*. It simply demonstrates the fine line which the Board has developed regarding when it will apply *Deklewa*,[11] a line which ignores the Board's own pronouncement that *Deklewa* would be applied to all pending cases.

In *Deklewa*, the Board held that its own previous analysis of section 8(f) was permeated with flaws which rendered it impossible to administer section 8(f) fairly and in line with its legislative objectives.[12] By its own

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[11] The lower court also distinguishes *Savoia* from the present case because *Deklewa* was issued one month before the administrative law judge in *Savoia* issued his findings and conclusions and two weeks before the employer filed his exceptions. The Board remanded the case so that the parties would have the opportunity to argue *Deklewa*. The lower court's suggestion that timing was a critical distinction between the two cases ignores the Board's own mandate that *Deklewa* may be applied to any pending case regardless of timing.

[12] See footnote 6, *supra*.

express mandate, the Board determined that the precepts announced in *Deklewa* were of such import that they should be applied to all pending cases at whatever stage. The Employers sought to have *Deklewa* applied during a Motion for Reconsideration while the case was still pending before the Board, and the Board abused its discretion in failing to follow its own mandate. Instead, the Board now seeks to apply its old, admittedly faulty, analysis of section 8(f). Simply stated, the Board should do what it said it would do, which is apply *Deklewa* retroactively to all pending cases at whatever stage.

II. THE BOARD FAILED TO FOLLOW ITS OWN MANDATE THAT EVIDENCE OF AN EMPLOYER'S GOOD-FAITH DOUBT OF MAJORITY STATUS SHOULD BE VIEWED IN ITS TOTALITY

A. *Evidence That Striking Workers Immediately Returned to Work, When Combined With the Other Factors Such as Decertification Petitions Signed by a Significant Number of Employees, Provides Evidence Sufficient To Support The Employers' Good Faith Doubt That The Union Lacked Majority Status.*

Even if this Court declines to apply *Deklewa*, the Board erred when it determined that the Employers improperly refused to recognize and bargain with the Union. According to the Board's own longstanding test, the Employers' conduct in not recognizing or bargaining with the Union, was justified if: (1) the Union did not, in fact enjoy majority support, or (2) the Employers had a good-faith doubt, founded on

sufficient objective evidence of the Union's majority support. *NLRB v. Curtin-Matheson Scientific, Inc.*, 110 S.Ct. 1542 (1990)(citing *Station KKHI*, 284 N.L.R.B. 1339 (1987)). In this case, the Employers had a bounty of objective evidence to support a good-faith doubt that the Union enjoyed majority status.

In determining whether an employer has sufficient objective evidence of loss of union support to justify a withdrawal from bargaining, the reviewing Board must look to the totality of the circumstances. *Celanese Corp. of America*, 95 N.L.R.B. 664, 671-73 (1951). Although both the Board and the lower court purported to assess several separate factors advanced by the Employers as evidence supporting their good-faith doubt of majority support, neither gave full weight to all the evidence collectively.

Here, the record taken as a whole, demonstrates substantial basis for the Employers' belief that the Union did not represent a majority of the employees during the relevant time period. It is undisputed that as of January 3, 1986, the date of nonrecognition, the Employers were aware that:

(1) 55 of a total of 69 striking employees had returned to work by November 24, 1985, a few days after the strike began (Appendix, p. 47a);

(2) 28 unit employees had signed a petition to reject the Union (Appendix, p. 88a);

(3) additional petitions to reject the Union were subsequently signed by 15 additional employees (Appendix, p. 88a, 91a); and

(4) employees abandoning the strike informally expressed anti-Union sentiments on the job (Appendix, p. 90a).

The Union's letter of December 20, 1985,[13] agreeing to accept significant wage concessions and to halt the strike, is further evidence of the Union's desperation to retain recognition in the face of mounting dissatisfaction. The totality of the circumstances above indicates that whatever support the Union had enjoyed in the Fall of 1985 had significantly deteriorated by early January 1986.

As discussed above, the vast majority of strikers returned to work less than a week after the strike began. The lower court cites *Bickerstaff Clay Prods. Co. v. NLRB,* 871 F.2d 980 (11th Cir. 1989) *cert. denied* 110 S.Ct. 292 (1989) for the proposition that the return of the striking workers is no indication of lack of support for the Union. (Appendix, p. 21a) However, it was recognized that while the return of striking workers in insolation does not establish lack of union support, return of striking workers in combination with other factors may provide evidence sufficient to establish an employer's good-faith doubt of union support. *Bickerstaff,* 871 F.2d at 988.

In *Bickerstaff,* 13% of the bargaining unit either withdrew their authorization to have dues deducted or resigned from the union following their return to work during the strike. *Id.* In the case at bar, even under the most conservative calculation (28 signatories out of 118

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[13] The entire text of the December 20th letter is set forth in footnote 2, *supra.*

employees)[14] 24% of the bargaining unit had signed a petition to reject the Union by the time Employers repudiated the Union.

B. *Evidence of an Employer's Good-Faith Doubt That a Union has Majority Status is Not to be Confused with Conclusive Evidence that the Union has Lost Majority Support.*

The Board has long held that an employer's reasonable, good-faith doubt as to a union's continued majority status is a defense to a charge of refusing to bargain in that such evidence is sufficient to shift to the General Counsel the burden to provide evidence that on the date of nonrecognition the union in fact did represent a majority. *Stone Rubber Co.*, 123 N.L.R.B. 1440, 1445 (1959). The good-faith doubt defense has been described by the Board as follows:

> We believe that the answer to the question whether the Respondent violated Section 8(a)(5) of the Act . . . depends, not on whether there was sufficient evidence to rebut the presumption of the Union's continuing majority status or to demonstrate that the Union in fact did not represent the majority of the employees, but upon whether the Employer in good faith believed that the Union no longer represented the majority of the employees. . . .
>
> By its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any

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[14] See discussion at Section III, *infra*.

> simple formula. It can only be answered in the light of the totality of all the circumstances involved in a particular case. *Celanese Corp. of America,* 95 N.L.R.B. 664, 671-673 (1951).

While both the Board and the lower court purport to adhere to this test, they do not give it meaningful application. This case is a perfect example of the fear expressed by Chief Justice Rehnquist in his concurring opinion to *Curtin-Matheson,* that while the Board attests that an employer's good-faith doubt of majority status may work as a defense to charges of refusing to bargain, the means by which an employer may demonstrate his good faith doubt are so sharply limited as to render the defense almost meaningless. *Curtin-Matheson,* 110 S.Ct. at 1555 (Rehnquist, C.J., concurring). Indeed, in this case the difference between conclusive evidence and evidence of a reasonable good faith doubt appears to be negligible. The Board suggests that because 28 signatories on a decertification petition did not constitute a majority as of January 3, 1986, Employers had insufficient objective basis for a good faith doubt as to the Union's status. (Appendix, p. 93a) However, it cannot be forgotten that under the Board's present test, the Employers need not conclusively demonstrate that the Union had *in fact* lost majority status. To the contrary, Employers here assert their good faith *doubt* that by January 3, 1986, the Union retained majority support in view of the totality of the circumstances enumerated above. As stated earlier, two additional petitions were circulated among the employees during late 1985 and early 1986. By the end of January 1986, 37 unit employees had in fact signed petitions. By the end of April 1986, 43 employees had

signed decertification petitions. (Appendix, p. 88a-91a) The Board and the lower court determined that the Employer's reliance on these two subsequent petitions "betrayed a lack of good-faith belief, because the Employers did not receive these until after the date of nonrecognition." (Appendix, p. 21a) It is ironic that the Board and the lower court construe these subsequent petitions as demonstrating a lack of good faith on the part of the Employers. In actuality, these two petitions reinforce the accuracy of the Employers' doubt.

In this case, it is undisputed that 80% of the striking employees returned to work days after the strike began, and even under the Board's erroneous calculation showing 118 unit employees, 24% of the unit employees had signed a decertification petition by the critical date. In fact, the Union did not represent a majority of employees when all of the decertification petitions are considered[15] and when the number and make-up of employees is accurately evaluated.[16] Further, several employees had made anti-Union comments to the Employers. On January 3, 1986, the date of nonrecognition, the Employers had every indication that Union support had seriously deteriorated and that the majority of employees rejected the Union as their representative. This Court should determine that the Board's finding is not substantially supported by the evidence as a whole, and the Employers had sufficient objective evidence to clearly and convincingly support

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[15] The three decertification petitions were signed by a total of 43 unit employees.

[16] See discussion of Section III, *infra*.

their good-faith doubt whether the Union was supported by a majority of their employees.

III. THE BOARD'S REFUSAL TO INFER THAT REPLACEMENT STRIKERS WOULD REJECT THE UNION AS THEIR BARGAINING REPRESENTATIVE IS AN ABUSE OF THE BOARD'S DISCRETION.

A. *The Employers' Good-Faith Doubt of Majority Status was Sufficiently Supported by the Fact that Over One-Half of the Bargaining Unit Consisted of Replacement Workers who had Crossed the Union's Picket Lines.*

As of the date of nonrecognition over one-half of the employees in the bargaining unit were replacement workers. The Board did not properly consider this large contingent of replacement workers when it evaluated the sufficiency of the Employers' good-faith doubt. The Board follows a "no-presumption" rule whereby it will not make any inference regarding a replacement worker's tendancy to support the union without direct evidence of the replacement workers' inclinations. Thus, an employer cannot base its good-faith doubt on the assumption that replacement workers would reject the Union whose picket line they crossed. In other circumstances the Board has acknowledged that the best interests of replacement workers and of unions often contradict. The Board's failure to make that same acknowledgment in the case of replacement strikers is not only inconsistent with its previous policy, it is also contrary to industrial reality and common sense.

The bargaining unit for the purposes of determining majority status in a case where the

employer has hired striker replacements consists both of the total number of strikers and strike replacements. 29 U.S.C. § 152(3); *C.H. Guenther & Son, Inc. v. NLRB,* 427 F.2d 983, 986-87 (5th Cir. 1970) *cert. denied* 400 U.S. 942 (1970). In the instant case, the Board asserts that the number of unit employees working for the Employers as of the critical date, January 3, 1986, totals over 100. The Board further asserts that 18 strikers had applied for return to work. (Appendix, 50a, 52a) Specifically, the Board determined that approximately 68 employees were working at Williams jobsites in early December 1985. Of these 68, 15 were included in a pre-strike pension fund report and the remaining 53 were strike replacements. (Appendix, p. 49a) The Board further determined that 10 Williams' strikers sought to return to work. (Appendix, p. 50a) As for Mosaic, the Board determined that as of early January 1986, 32 employees were working. Eight of the 32 were replacement workers and 8 Mosaic strikers sought to return to work. (Appendix, p. 51a) Using these estimates (which are the most conservative and favorable to the Board),[17] there

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[17]The ALJ never determined exactly how large the bargaining unit was at the date of nonrecognition. He did find that it contained "more than 100 employees." (Appendix, p. 93a)

Further, the Board erred in the manner in which it calculated the number of unit employees by including all names on the Employers payroll lists near the date of nonrecognition. This was error for two reasons. First, the Employers' payroll lists do not accurately identify employees in the relevant unit on the job as of the critical date. In the construction industry, the work force fluctuates and payroll lists include the names of all persons due to be paid, not just names of persons currently on the job. The record contains no evidence in support of the Board's finding that all names on the payroll list were actively employed on the critical date.

were 118 employees in the bargaining unit for the purposes of determining majority support. The Board determined that of these 118, over one-half were strike replacements. The issue of whether to presume that strike replacements either oppose or support a union was an issue which sharply divided this Court in *NLRB v. Curtin-Matheson Scientific, Inc.*, 110 S.Ct. 1542 (1990)(interpreting the Board's no presumption rule presented in *Station KKHI*, 284 N.L.R.B. 1339 (1987)). *Curtin-Matheson* was similar to the present case in that it concerned an employer who refused to bargain with the union, professing a good-faith doubt that the union represented a majority of the employees. In that particular case the bargaining unit consisted of 49 employees: 19 strikers, 5 employees who crossed the picket lines and 25 strike replacements. As in this case, strike replacements constituted more than one-half of the bargaining unit. The majority opinion in *Curtin-Matheson* upheld the Board's refusal to presume,

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Second, the ALJ completely disregarded evidence that the payroll list included members of two different unions. The difference in wages between the tile setters and tile helpers is due to the fact that they do not belong to the same labor union. Nevertheless, the ALJ concluded that "there is no discernible reason for the different pay rates" and attributed the difference to his assumption, in the absence of any evidence, that "union members were paid at the contract rate of $10.59 hourly, while all other employees, i.e., new employees, were paid at higher rates [of $13.27 hourly]." (Appendix, p. 48a-49a) In fact, the reason for the difference in rates of pay is that the workers earning $13.27/hourly were skilled mechanics and members of another bargaining unit. Evidence of this fact was not introduced at the hearing because the Employers had no reason to anticipate the ALJ would simply "infer," without any evidence whatsoever, that they were all members of the same union. The record contains no evidence in support of the Board's finding that all names on the payroll list were members of the same Union and, to the contrary, the pay differentials suggest that they were not.

without direct evidence to the contrary, that strike replacements would repudiate the union.

> Regarding respondent's hiring of striker replacements, the Board stated that, in accordance with the *Station KKHI* approach, it would "not use any presumption with respect to [the replacements'] union sentiments," but would instead "take a case-by-case approach [and] require additional evidence of a lack of union support on the replacements' part in evaluating the significance of this factor in the employer's showing of good-faith doubt." *Curtin-Matheson,* 110 S.Ct. at 1548 (citing *Station KKHI,* 287 N.L.R.B. 1339 (1987)).

While the majority deferred to the Board's "no presumption" approach, four justices strongly criticized it. Justice Blackmun dissented on the basis that the Board's "no presumption" rule departed, without explanation, from principles announced and affirmed in previous Board decisions concerning other issues, such as *Service Electric Co.,* 281 N.L.R.B. 633 (1986) and *Leveld Wholesale, Inc.,* 218 N.L.R.B. 1344 (1975). These decisions rested on the premise that a union cannot be expected to give balanced representation to both its striking members and the workers hired to replace them.[18] *Curtin-Matheson,* 110 S.Ct. at 1556 (Blackmun, J., dissenting). Justice Blackmun could not reconcile the Board's position in this previous line of cases that the interests of strikers and replacement workers are often

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[18] "Strike replacements can reasonably foresee that, if the union is successful, the striker will return to work and the strike replacements will be out of a job. It is understandable that unions do not look with favor on persons who cross their picket lines and perform the work of strikers." *Leveld Wholesale Inc.,* 218 N.L.R.B. 1344, 1350 (1975).

diametrically opposed with the Board's failure to infer in *Curtin-Matheson* that replacement workers would reject the union. *Id.*

Justice Scalia's dissent, which was joined by Justices O'Connor and Kennedy, also noted the inconsistency between the no presumption approach and the Board's position on striker replacements in other cases concerning unrelated issues. *Id.,* 110 S.Ct. at 1559-60 (Scalia, J., dissenting). Additionally, Justice Scalia based his dissent on the Board's inability to logically support its conclusion that it could not infer that replacement workers who cross a union's picket line would repudiate that union as its bargaining representative. Justice Scalia effectively outlined — using the Board's own previous opinions — why the realities of the workplace indicated that replacement workers would repudiate a union. As Justice Scalia noted, under the Board's previous opinions, replacement workers would have been "foolish" to expect that their best interests would be considered by the union whose picket line they crossed, and, "in light of their status as breakers of that union's strike, would have been foolish not to expect their best interest to be subverted by that union wherever possible." *Id.,* 110 S.Ct. at 1560 Justice Scalia then determined that the no presumption approach to replacement workers was a result of the Board allowing its policy making role to color its factfinding role.

> It [the Board] is not entitled to disguise policy-making as factfinding, and thereby to escape the legal and political limitations to which policymaking is subject. Thus, when the Board purports to find no good-faith doubt because the facts do not establish it, the question for

> review is whether there is substantial evidence to support that determination. Here there is not. *Id.*, 110 S.Ct. at 1566.

Chief Justice Rehnquist, who joined in *Curtin-Matheson's* majority opinion, noted in his concurrence that the Board's no presumption rule pressed the limit to which the Board is entitled in assessing industrial reality. *Id.*, 110 S.Ct. at 1555 (Rehnquist, C.J., concurring). This case is a perfect example of how the "no presumption" rule surpasses that limit. At the date of non-recognition, 61 of 118 (over one-half) of the employees in the bargaining unit were strike replacements who crossed the Union's picket lines. As of that same date, 28 employees had signed a de-certification petitions attesting that they did not want the Union as their representative and similar petitions were or began circulating. Earlier, 80% of the strikers left the picket lines and returned to work less than a week after the strike began. Finally, all during this period, the Employers were hearing anti-Union sentiments from the workers. One must ask, if this evidence did not suffice to objectively demonstrate the Employers' good-faith doubt of the Union's continued majority support, what evidence would?

CONCLUSION

For all the foregoing reasons, the Petitioners respectfully request that the Court grant its Petition for a Writ of Certiorari.

Dated: October 12, 1991
Atlanta, Georgia

Respectfully submitted,
MCNEILL STOKES
Counsel of Records

FRANKEL, HARDWICK,
TANENBAUM & FINK, P.C.
359 E. Paces Ferry Road
Atlanta, Georgia 30305
(404) 266-2930
Attorney for Petitioner

APPENDICES

APPENDIX A

U.S. MOSAIC TILE CO., INC., Williams Tile and Terrazzo Co., Inc., Petitioners,

Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent, Cross-Petitioner.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

TILE, TERRAZZO & MARBLE CONTRACTOR ASSOCIATION OF ATLANTA & VICINITY AND Williams Tile Company, Respondents,

Nos. 90—8617, 90—8757.

United States Court of Appeals,

Eleventh Circuit,

July 17, 1991.

Before KRAVITCH and CLARK, Circuit Judges, and GODBOLD, Senior Circuit Judge.

KRAVITCH, Senior Circuit Judge:

This case arrives on our bench after the National Labor Relations Board ("Board") determined that certain construction industry employers had violated various fair bargaining provisions of the National Labor

Relations Act ("Act"). The employers asked the Board to reconsider its decision, and the Board refused on the ground that the motion to reconsider raised an affirmative defense which properly should have been presented at an earlier stage of the proceedings. The employers petition that we review the Board's decision and the Board seeks enforcement. We hold that the Board acted within its discretion in determining that the employers failed to timely present their defense under section 8(f) of the Act, and that the Board properly determined that the employers violated the Act.

I

Petitioners Williams Tile & Terrazzo Co. and U.S. Mosaic Tile Co. (hereinafter "Williams" and "Mosaic" individually, "Employers" collectively) operate tile, terrazzo, marble and slate installation businesses. In 1983 the two companies formed the Tile Terrazzo & Marble Contractors Association of Atlanta & Vicinity (the "Association") which joins the petitioners in this action. Williams and Mosaic are the exclusive members of the Association. In 1983 the Association entered into a two-year collective bargaining agreement with Tile, Marble & Terrazzo Finishers and Shopmen, Local 167 (the "Union"); the agreement covered the period from October 1983 through September 1985. Prior to this agreement the Union had represented the employees of the companies for approximately seventeen years. The Association considered the Union to be the collective bargaining representative for all the employees involved in the tile construction work within the Union's jurisdiction.

In August 1985 the Union and the Association began bargaining for a new agreement. Although they held several bargaining sessions, the then current agreement expired on September 30 without the parties achieving a succeeding agreement. On November 12 the Association presented its final offer. That offer included a pay rate of $9.00 per hour, which was a reduction from the $10.59 rate under the prior agreement. The Union rejected the offer and negotiations ended. On November 19 the Union employees began a strike; the administrative law judge ("ALJ") later found the action to constitute an economic strike spawned by the wage issue. At some point during the last week of November, the Association terminated its contributions to the employees' fringe benefits fund. These contributions had been required by the expired contract, and the Association had not proposed terminating them during any of the negotiations. At the beginning of that final week in November, on Monday the 24th, approximately fifty-five of the employees returned to work. The various parties sharply contest the total number of employees who were considered within the "unit" of the Union from which the Association members could hire; the ALJ found the number to be over 100.

On December 20 the Union business manager, James Clowers, sent a letter to the chairman of the Association, Kenneth Williams, and a copy to Mosaic's Vice President Thrower. In this letter Clowers stated that the remaining employees were making an unconditional offer to return to work and to accept the $9.00 per hour pay rate. He also noted that the final

agreement had to be ratified by the Union. The evidence regarding receipt of and responses to this letter was a source of much debate before the ALJ: Clowers stated that on December 27 Thrower informed him that the offer seemed satisfactory but that he had to consult Williams; Thrower disputed this, testifying that he never said the offer was acceptable and in fact he believed the offer was not unconditional because the Union had to ratify the agreement. Williams testified that he had not read the letter as of January 3 when Clowers reached him by telephone. When Williams spoke with Clowers on January 3, he told Clowers that he doubted that the Union had a majority of the employees under its control. Williams stated that this belief was partially a result of the fact that some employees had signed decertification petitions expressing their rejection of the Union.

After failing to receive an official response from the Association regarding the Union's offer, the Union sent another letter on January 28 informing the Association that the November settlement offer had been accepted as a contract by the Union members. Mosaic and Williams did in fact rehire several of the striking employees during January, February and March, but twelve of the strikers were not reinstated. The ALJ found that both companies hired other employees in lieu of reinstating the twelve strikers.

The Union eventually sought redress through the Board. On February 26 it filed charges against the Association alleging a refusal to bargain in good faith, a

violation of section 8(a)(5) of the Act.[1] On June 5 the Union also alleged that the Employers violated section 8(a)(3) by discriminatorily refusing to rehire and delaying in rehiring certain employee-strikers, and on June 25 it filed charges that the Association improperly stopped contributing to the fringe benefit funds in violation of section 8(a)(5). This latter charge was dropped on July 28; but at that time the former charges were amended to include the fringe benefit fund allegation. The Regional Director of the Board then consolidated these charges into a complaint on July 31. Hearings were held before the ALJ that September, and the ALJ issued his opinion on March 27, 1987. The ALJ concluded that the Association and Employers had violated the various provisions of the Act. The parties filed their exceptions and responses to the ALJ's report with the Board in May, and the Board affirmed the conclusions of the ALJ in December of 1987.

In January 1988 the Employers filed a motion with the Board for reconsideration, arguing, for the first time, that a recent opinion issued by the Board affected the case. The Employers urged the Board to reconsider its position in light of *John Deklewa & Sons,* 282 N.L.R.B. 1375 (1987) *enf'd sub nom. Int'l Assn. of Bridge, Structural and Ornamental Iron Workers Local No. 3 v. NLRB,* 843 F.2d 770 (3rd Cir.), *cert. denied,* 488 U.S. 889, 109 S.Ct. 222, 102 L.Ed.2d 213 (1988), in which the Board changed its interpretation of section 8(f) of the Act.[2]

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[1] Sections 8-10 of the Act are codified at 29 U.S.C. §§ 158-60.

[2] Section 8(f) of the Act provides an exception to other bargaining provisions of the Act for the construction industry. Generally, a

collective bargaining representative (union) outside the construction industry must be designated or selected by a majority of the employees in a given unit before that representative can have the exclusive right to represent the employees in bargaining with the employer. Once a representative achieves this status under § 9(a), it receives various bargaining protections provided by § 8(a) and (b) of the Act. The union also receives a presumption of majority status for a reasonable time, including during the period immediately after the end of a prior agreement when the parties are bargaining for a new contract; the employer must have a reasonable, good faith belief that the union has lost its majority in order to withdraw recognition of the union after the agreement ends. *See Iron Workers*, 843 F.2d 770, 772. Congress, recognizing the uniquely fluctuant nature of the construction industry, enacted § 8(f), which enables a representative of employees in the construction industry to enter a collective bargaining agreement with an employer without first having achieved majority status. The agreements are known as pre-hire agreements. The 1983-85 agreement involved in the present case was a pre-hire agreement.

Prior to *Deklewa* the Board interpreted § 8(f) to permit either party to terminate the bargaining agreement at will, so long as the union had not achieved majority status. *R.J. Smith Construction*, 191 N.L.R.B. 693, *enf. denied sub nom. Operating Engineers Local 150 v. NLRB* 480 F.2d 1186 (D.C.Cir.1973). The Board also determined, however, that if the union achieved majority status during the period of the agreement, it would receive the same protections as a § 9(a) union, including the presumption of majority status upon the expiration of the bargaining agreement. The Supreme Court later approved this interpretation as reasonable, though not necessarily the only one possible. *NLRB v. Local 103, Int'l Ass'n of Bridge and Ornamental Iron Workers (Hidgon Construction Co.)* 434 U.S. 335, 98 S.Ct. 651, 54 L.Ed.2d 586 (1978).

Subsequent litigation naturally produced a complicated, fact-specific framework for determining when a union achieved majority status during the term of the pre-hire agreement. The Board, realizing the confusion and difficulty created by its own interpretation, decided to overhaul its view of § 8(f) agreements. Thus, in *Deklewa* the Board decided that pre-hire agreements were no longer terminable at will, but were valid for the entire term. Additionally, the Board stated that the union would no longer receive the presumption of majority status upon expiration of the agreement, and thus would not retain the right to exclusive bargaining at that point. The union could, however, achieve majority status though the traditional methods for becoming a § 9(a) representative: Board certified election or voluntary recognition by the

The Employers argued that, under *Deklewa's* new interpretation section 8(f), the Union was not entitled to the presumption of majority status after expiration of the 1983-85 agreement. The Board denied the motion, asserting that the Employers were presenting an untimely affirmative defense under section 8(f) of the Act. Because *Deklewa* had been issued on February 20, 1987, the Board held that the Association should have pled any defenses based on that case prior to the Board's Final Order. The Employers then petitioned that we reverse the Board's Order, and the NLRB asked that we enforce that Order.

II

The parties present a bountiful bag of issues, including the applicability of *Deklewa* and an analysis of the facts under both pre-*Deklewa* and post-*Deklewa* law. Before we consider the full range of these issues we

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employer. 843 F.2d at 778. The Board also stated that the new interpretation, because it implemented the policies of the Act far better than the old rule, would apply retroactively to all pending cases.

We are in the unique position of having to confront the Board's affirmative defense position before this circuit has considered the *Deklewa* rule itself. Several circuits have now approved of *Deklewa*, often relying on the reasoning used by the Third Circuit when it enforced *Deklewa* in *International Assoc. of Iron Workers v. NLRB*, 843 F.2d 770 (3rd Cir.), *cert. denied*, 488 U.S. 889, 109 S. Ct. 222, 102 L.Ed.2d 213 (1988). *See C.E.K.* Indus. *Mechanical Contractors v. NLRB*, 921 F.2d 350 (1st Cir.1990); *NLRB v. Bufco Corp.*, 899 F.2d 608 (7th Cir.1990); *NLRB v. W.L. Miller Co.*, 871 F.2d 745 (8th Cir.1989); *Mesa Verde Construction Co. v. Northern California Counsel of Laborers*, 861 F.2d 1124 (9th Cir.1988) (en banc). The Supreme Court denied *certiorari* in *Deklewa*, and has not otherwise addressed the issue. Because we hold that the Board correctly refused to hear the *Deklewa* defense, we cannot now speak to the viability of *Deklewa* in our circuit.

must determine whether the Board properly denied the Employers' attempt to argue *Deklewa*.

In their motion for reconsideration, petitioners asserted that the actions which were found to constitute a violation of the Act were permissible under the interpretation of the Act espoused in *Deklewa*. Because neither the Board nor the ALJ considered *Deklewa* in their decisions, argued the Employers, reconsideration was necessary. After a response by the Board's general counsel and a reply by the Employers, the Board denied the motion with the following statement:

> We deny the Motion for Reconsideration because the Respondents [Employers] seek to raise a defense that is now untimely. The Respondents contend in their motion that this proceeding is now governed by the principles of Section 8(f) of the Act as set forth under *Deklewa*. Such a defense, however, was not raised by the Respondents in their exception to the decision of the administrative law judge.[3] In their exceptions and supporting brief, the Respondents failed to assert the existence of any issue under Section 8(f). Further, the Respondents did not refer to *Deklewa*, even though *Deklewa* had issued on February 20,

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[3] Because this proceeding was not pending before the Board on exceptions arguably raising an 8(f) issue when the decision in *Deklewa* issued, it is distinguishable from *Ron E. Savoia Construction Co.*, 289 NLRB No. 26 (June 17, 1988). See also *Yorkaire, Inc.* 297. NLRB No. 58 (Nov. 30, 1989) and *Howard Electrical and Mechanical Inc.*, 293 NLRB No. 51 (Mar. 29, 1989)....

> 1987, prior to the administrative law judge's decision of March 25, 1987, in this proceeding.[4] Moreover, *Deklewa* already had issued over two months prior to the Respondent's (sic) filing of its (sic) exceptions and brief on May 4, 1987. Further, during the pendency of this case before the Board, between the filing of the exceptions and the issuance of the Decision and Order on December 17, 1987; the Respondents did not attempt to assert the existence of any issues under Section 8(f). Indeed, the Respondents found it appropriate to assert the defense now raised only *after* the issuance of an unfavorable Decision and Order affirming the judge's findings that the Respondents violated the Act. In these circumstances there are no "extraordinary circumstances" within the meaning of Section 102.48(d)(1) of the Board's Rules and Regulations which would justify granting the Respondents' motion.

In order to comprehend fully our role as an enforcing court in this situation, we must consider the proper deference to be granted the NLRB. Generally, the Board's decisions on whether to grant motions for reconsideration are, like other procedural determinations, within its discretion. *See NLRB v.*

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[4] In their brief in support of exceptions, Respondents contended that at the time they withdrew recognition from the Union, there were sufficient objective considerations to conclude that the Union "no longer represented a majority of their employees" and "had lost its majority support." The Respondents did not contend that the bargaining relationship entered into was 8(f) in character until the filing of their Motion for Reconsideration.

Seafarers Int'l Union 496 F.2d 1363 (5th Cir.1974);[5] see *also, e.g., NLRB v. H.M. Patterson & Son*, 636 F.2d 1014, 1018 (5th Cir. Unit B Feb. 1981) (Board's alleged procedural errors reviewed for an abuse of discretion). Section 10(d) of the Act provides that the Board has the discretion to determine and apply its rules for modification of opinions: "Until the record in a case shall have been filed in a court... the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it." 29 U.S.C. § 160(d).

Statements regarding the general deference applied to motions for reconsideration, however, do not resolve the question of deference in this case. As discussed below, the Board's decision rested on both procedural determinations and an implicit statutory interpretation. We grant deference to both procedural and interpretive decisions by an agency; our deference to these two types of decisions, however, stems from different principles which require somewhat distinct analyses. As stated above, deference to the agency procedural interpretations is based primarily on congressional requirements expressed through section 10(d) of the Act.[6] Deference to an agency's substantive

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[5] The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

[6] As Professor Davis has keenly observed, "[a] theory that the courts may not specify what procedure agencies should use except when the courts are either interpreting due process or a particular statute could be a reasonable one. But it is not the law." K. Davis, Administrative Law

interpretation of the statute it enforces, on the other hand, is founded on Supreme Court precedent, particularly *Chevron, U.S.A. v. Natural Resources Defense Counsel*, 467 U.S. 837, 104 S.Ct. 2778, 81 L. Ed.2d 694 (1984), and its progeny. With these contours of deference in mind, we can better understand our task of reviewing the Board's decision.

The question of whether the Board correctly denied the motion divides into several issues. Initially we must determine whether the Board's characterization of the application of *Deklewa* as an affirmative defense, which is a question of statutory interpretation, was proper.[7] If it was not proper, then we must determine whether the Board's failure to apply *Deklewa*

Treatise (1980), § 14.10. The question of whether a court should grant deference to agency procedural determinations in the absence of due process issues and statutory requirements currently ferments in the federal courts, see id, but fortunately in this case Congress explicitly has required deference on the issue of modifications of agency opinions.

[7] The Board, in its brief, urges that the failure of the Employers to present the *Deklewa* issue at the proper time precludes us from considering the issue at this stage, citing *Corson and Gruman Co. v. NLRB*, 899 F.2d 47, 49-50 (D.C. Cir.1990). This misconstrues *Corson* and the posture of the present case. In *Corson* the employer had not presented the *Deklewa* argument to the Board at any stage. Section 10(c) of the Act provides that "[n]o objection that has not been urged before the Board .... shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). Thus the D.C. Circuit determined that section 10(e) barred it from considering the argument. The court did observe, however, that had the employer raised the argument before the Board at any one of several occasions, including by motion for reconsideration, the issue might have been preserved for appellate court consideration. 899 F.2d at 49-50. Because Mosaic did raise the *Deklewa* argument in the reconsideration motion to the Board, our consideration is not precluded by § 10(e).

amounted to arbitrary and capricious action. If the issue was correctly determined to be a defense, however, then we must decide whether the Board abused its discretion by concluding, as a procedural matter, that the defense was untimely.

The Board, unfortunately, did little to explain why *Deklewa* was an affirmative defense in this case. The order denying the motion for reconsideration simply asserted that the Association had failed to present this issue as a defense, and then proceeded to discuss why the defense was not timely. The Board's statement that the issue was an affirmative defense focused not on *Deklewa* itself, but on section 8(f) of the Act. We interpret this to mean that the Board viewed the Association's argument as arising under section 8(f), that it considered Employers' assertion of section 8(f) to be an affirmative defense, and that it believed that *Deklewa* constitutes law to be argued under that section only when the issue of a section 8(f) contract is properly before the Board.

The question of whether to label certain issues raised under section 8(f) as defenses is one of statutory interpretation. As such, we are guided by *Chevron, U.S.A. v. Natural Resources Defense Counsel*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), in which the Court established the principles of statutory construction and deference to agency interpretations. If Congress has spoken to the issue with which we are concerned, there is no need for deference. If Congress has not addressed the issue, the court defers to the agency if its interpretation is reasonable, that is, if it is not arbitrary, capricious, or clearly contrary to law.

Chevron, 104 S.Ct. at 2781-83; *Lipscomb v. United States*, 906 F.2d 545, 548 (11th Cir.1990).[8]

Turning to the statute, we observe that the second tier of *Chevron* governs our review. The statute permits employers and unions in the construction industry to enter bargaining agreements prior to hiring employees and prior to the establishment of the union's majority status; the statute is silent, however, on whether the assertion of rights under this section can be considered an affirmative defense within the agency's proceedings. Given congressional silence, we defer to the Board's interpretation that the Employers' assertion of a section 8(f) contract and consequent *Deklewa* rights constituted an affirmative defense unless that interpretation is unreasonable.

The petitioners argue that the Board's characterization of their section 8(f) argument as a defense is unreasonable because it does not square with prior Board statements regarding *Deklewa* and section

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[8] Although the agency action in *Chevron* involved a legislative regulation, the deference standards set forth in that case are now applied to most agency actions, including administrative adjudications such as those by the NLRB. *See K. Davis, Administrative Law Treatise* (1989 Supp.) § 29:16-7; *see also, Chemical Mfrs. Ass'n. v. Natural Resources Defense Council*, 470 U.S. 116, 105 S.Ct. 1102, 84 L.Ed.2d 90 (1985) (applying *Chevron* to Environmental Protection Agency's case-by-case variance determinations as well as its regulations); *Hammontree v. NLRB*, 925 F.2d 1486, 1491 (D.C.Cir.1991) (applying the *Chevron* analysis to an NLRB adjudicative determination). As Justice Scalia recently scribed, "[i]n an era when our treatment of agency positions is governed by *Chevron*, the 'legislative rules v. other action' dichotomy ... is an anachronism." *EEOC v. Arabian American Oil Co.*, ___ U.S. ___, 111 S.Ct. 1227, 1236, 113 L.Ed.2d 274 (1991) (Scalia, J. concurring).

8(f).[9] In Deklewa the Board did not pass on the question of affirmative defenses, but rather formulated a new interpretation of section 8(f) and asserted that it would apply retroactively. Indeed, to the extent that the Board in the present case interpreted *Deklewa* to be simply a statutory interpretation under section 8(f), language in *Deklewa* supports the position: the "principles we advance today provide an overall framework for the interpretation and application of Section 8(f)...." *Deklewa*, 282 N.L.R.B. 1375, 1385. Furthermore, in it's discussion of retroactivity, the *Deklewa* Board stated that "the Board is doing nothing more than holding parties to the terms and conditions of 8(f) contracts...." *Id.* at 1389. In *Deklewa* the section 8(f) issues were central to the case as presented to the Board initially, and the Board simply applied it's new interpretation of section 8(f) agreements; the Board did not have occasion to determine the procedural nature of section 8(f) issues.

It can be argued that *Deklewa's* pronouncement of retroactivity is inherently inconsistent with the Boards

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[9] The Supreme Court has given some indication that agency inconsistency on a position reduces the deference to which it is entitled under the second tier of *Chevron*. *See I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 446 n. 30, 107 S.Ct. 1207, 1221, 94 L.Ed.2d 434 (1987). In *Cardoza Fonseca*, however, the Court determined that it was interpreting the explicit language of the statute and not an implicit gap, and thus was applying the first, non-deferential tier of *Chevron*. *Id.* 480 U.S. at 446-49, 107 S.Ct. at 1221-22. We believe that we need not speculate on how this passing discussion of agency inconsistence affects the *Chevron* analysis, because agency inconsistency is easily encompassed in the analysis of whether the agency action is arbitrary and capricious. Indeed, agency inconsistency on a matter of statutory interpretation, if not well articulated, would almost epitomize arbitrary agency action.

current position that Employers were asserting section 8(f) as an affirmative defence. Indeed, petitioners assert that although the Board had the discretion to establish the new rule in *Deklewa*, it affirmatively limited it's own future discretion by stating that the rule should apply retroactively to all pending cases. In other words, petitioners claim that the Board abused it's discretion by not adhering to it's own implied limitation of discretion.

This position, however, misinterprets decisions of the Board and the distinction between retroactivity and affirmative defences. As we stated, the Board in *Deklewa* did not determine whether section 8(f) was an affirmative defense, but only that it applied retroactively to pending cases. It is not inconsistent with *Deklewa* for the Board now to assert that certain section 8(f) issues arising after *Deklewa* are defenses which can be lost by failure to plead or argue. Although such a decision may result in a more limited retroactive effect of *Deklewa* than would be the case otherwise, it does not prevent retroactive application in cases where the possible existence of a section 8(f) contract is properly raised by a party under the procedures established by the Board or otherwise before the Board.[10]

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[10] Although it is possible that in some cases the Board should apply § 8(f) absent a § 8(f) argument by either party, the facts of this case do not warrant such a conclusion. Both the Employers and the Board originally considered this case to be governed by § 9(a). This dispute could reasonably be seen as a § 9(a) dispute, and we do not read the facts to indicate that the Board was compelled to recognize the possible

The argument that the Board has been unreasonably inconsistent is not limited to a comparison with *Deklewa*; it may also be possible that the Board's more recent applications of *Deklewa* implicitly reject the possibility that a section 8(f) argument under *Deklewa* is an affirmative defense rather than an issue of statutory interpretation for the Board to raise *sua sponte*. As the Board itself recognized, it's decision in *Ron E. Savoia Construction Co.*, 289 N.L.R.B. No. 26 (June 17, 1988) could be construed to express a policy that *Deklewa* issues require *sua sponte* consideration by the Board. In *Savoia*, also a case involving a construction industry pre-hire agreement, the ALJ issued his decision a month prior to *Deklewa* and the parties' exceptions to the ALJ's decision were filed two weeks before *Deklewa*. The Board later, *sua sponte*, remanded the case to the ALJ so that he could apply and the parties could argue *Deklewa*.

Although an initial reading of *Savoia* might indicate some contradiction with the Board's present failure to consider *Deklewa sua sponte*, two factors demonstrate that the Board acted within its discretion. First, in *Savoia* the employers arguably had anticipated *Deklewa* and thus raised a section 8(f) defense in their exceptions. The Board stated that, although the Employer's exception did not mention section 8(f) explicitly, it did assert that *Savoia* never recognized the union as a bargaining representative and would not do so unless the union were certified. 289 N.L.R.B. No. 26.

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application of § 8(f). It was therefore up to the parties to raise § 8(f) in this case.

The Board construed this statement as raising potential section 8(f) arguments similar to the interpretation of section 8(f) agreements in *Deklewa*—that upon termination of pre-hire agreements the union loses its bargaining status unless recognized or certified. Therefore, as the employer had anticipated *Deklewa* and raised the issue of a section 8(f) contract, it should have the opportunity to argue *Deklewa*. Second, the employer in *Savoia* had not had the opportunity to present an argument to the Board based on *Deklewa* because the decision issued after the employer filed its exceptions with the Board. Under that unique circumstance, the employer had no opportunity to argue fully the section 8(f) affirmative defenses.

In the present situation the Board takes the position that *Savoia* and this case are quite different: the Employers' exceptions to the ALJ report did not contain even a colorable section 8(f) argument, and their exceptions were filed well after *Deklewa*.[11] This position of the Board is entirely consistent with its determination that the Employers' assertion of section 8(f) issues in this case constituted an affirmative defense, and, as such, should have been presented at the first feasible stage after *Deklewa* issued. The Board

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[11] Indeed, the Employers failed to take exception with the ALJ's statement that the employees constituted "a unit appropriate for collective bargaining within the meaning of Section 9(a) of the Act." Had the Employers wanted to alert the Board to the possibility that this case should have been analyzed under section 8(f), they should not have left uncontested such references to section 9(a); the Employers silence here created the implied assumption that they believed that section 9(a), and not section 8(f), controlled. See supra note 8.

will only allow exceptions for special circumstances such as those in *Savoia*, where there was a colorable section 8(f) claim present in the exceptions to the ALJ report and where more precise presentation was not possible because *Deklewa* had not issued. Given that the Board's decision can reasonably be interpreted as consistently viewing *Deklewa* issues to be affirmative defenses,[12] we cannot say that the Board abused its discretion in so holding here.

Having determined that the Board did not abuse its discretion in holding that *Deklewa* issues are affirmative defenses, we next consider whether its failure to consider an affirmative defense for the first time on a motion to reconsider constitutes an abuse of discretion. This question is far simpler. Congress explicitly provided the Board with the power to determine its own reasons and procedures for reconsidering its decisions. 29 U.S.C. § 160(d). Petitioners do not raise any due process claims with regard to the Board's decision not to consider affirmative defenses when not raised prior to a final order; in fact, their arguments regarding the motion for reconsideration rests almost

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[12] By presenting the Board's decision in *Savoia*, we have purposely discussed the agency's consistency with regard to the one case which could arguably have been inconsistent. We note that the agency has on other occasions specifically held that § 8(f) arguments presented after *Deklewa* were untimely raised. *See Yorkaire, Inc.*, 297 N.L.R.B. No. 58 (failure to argue *Deklewa* at the ALJ hearing which was held after *Deklewa* had issued barred party from raising it before the Board); *Howard Electrical and Mechanical, Inc.*, 293 N.L.R.B. No 51 n. 5 (failure of party to argue *Deklewa* in exceptions to ALJ report and after *Deklewa* issued barred the Board from considering the issue). These decisions emphasize the Board's consistent characterization of § 8(f) issues arising after *Deklewa* as affirmative defenses.

entirely on the proposition that *Deklewa* is not an affirmative defense. We find it entirely reasonable for the Board to require parties to present all their arguments in their exceptions to the ALJ's report, unless the Board finds exceptional circumstances. This rule avoids the sandbagging effect of one party waiting to see if a decision is favorable and then, if it is not, raising new arguments. The rule therefore promotes the agency's fair and efficient administration of the Act, and we cannot say that the Board's application of this rule in this case constituted an abuse of discretion.

III

Next we turn to the Board's substantive determination that the Employers violated the Act. The Board, adopting the ALJ's report, determined that the Employers violated section 8(a)(3) of the Act by failing to rehire economic strikers and violated section 8(a)(5) by 1) terminating contributions to the employees' fringe benefit fund, and 2) refusing to recognize and bargain with the Union. The Board then ordered, *inter alia*, that the Employers 1) reinstate the strikers they had failed to rehire, 2) make whole all strikers they failed to rehire after January 3, including both the strikers they did not rehire and the strikers they rehired only after some delay, 3) make whole the fringe benefit fund according to the terms of the former bargaining agreement, and 4) recognize the Union as the representative of the employees and bargain with it upon request. We review the Board's decision to see that, considering the entire record, it is supported by substantial evidence. 29 U.S.C. § 160(e); *Bickerstaff Clay Products Co. v. NLRB*, 871 F.2d 980, 984 (11th Cir.1989).

Refusal to Bargain

Generally, when a collective bargaining agreement expires the union retains the presumption of majority status.[13] *NLRB v. Imperial House Condominium,* 831 F.2d 999, 1007 (11th Cir.1987). An employer need not recognize the union, however, if 1) the union has in fact lost its majority status, or 2) the employer has a good faith doubt, based on objective evidence, that majority status has been lost. *NLRB v. Curtin Matheson Scientifics, Inc.*,__U.S.__,110 S.Ct. 1542, 1549-50, 108 L.Ed.2d 801 (1990). There is no dispute about the fact that the Employers withdrew recognition from the Union on January 3 when Williams told the Union representative that he believed the Union had lost majority status. Nor is there any issue before us regarding whether the Union in fact had lost majority status. The sole issue presented to us by petitioners regarding the refusal to bargain is simply whether the Board incorrectly ignored the totality of the evidence supporting the Employers' good faith belief that majority status had been lost. To support this good faith belief, the Employers point to the following evidence: 1) a majority of the strikers returned to work within days after the strike; 2) the Employers received

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[13] In analyzing the facts and issue in this case the Board assumed that the bargaining agreement and union-employer actions were governed by section 9(a) of the Act because the arguments presented to the Board by the parties were framed in that manner. Because we hold that the Board did not abuse its discretion by refusing to consider a belated affirmative defense asserting that section 8(f) should govern the case, and because this circuit has not yet established the *Deklewa* rule as the law of the circuit, we likewise operate under the view that section 9(a) principles control.

petitions signed by forty-three employees expressing dissatisfaction with the Union at the beginning of January; and 3) the Employers had heard verbal statements of dissatisfaction from employees.

This circuit has held that an employee's returning to work during a strike does not itself reflect a rejection of the union. *Bickerstaff*, 871 F.2d at 988. Strikers returning to work can only support a good faith belief of lost majority when combined with other evidence. *Id*. As supporting evidence the Employers cited the petitions signed by employees which rejected the Union. The ALJ found, however, that the Employers' reliance on these petitions betrayed the lack of a good faith belief, because the Employers did not receive all the petitions until after the nonrecognition on January 3. We hold that there was sufficient evidence to support the Board's adoption of the ALJ's conclusions. The relevant bargaining unit for the purpose of majority status was the multi-employer unit of over 100 employees, and the petitions received by the Employers as of January 3 listed only twenty-eight names. The Employers' attempts, after the fact, to support their actions with petitions which they had not received provides further evidence to support the Board's conclusion that the Employers were not relying in good faith on those petitions. Finally, the Board also correctly concluded that oral statements by some employees which were referred to as "rumblings through the shop" by Williams, could not support a good faith belief that the Union had lost majority status. *See United Supermarkets, Inc. V. NLRB*, 862 F.2d 549, 554 (5th Cir.1989) (vague assertions insufficient to support a good faith belief). These factors, even when

combined, are insufficient to support the conclusion that the Employers had a good faith belief that majority status was lost. The Board correctly rejected such a defense by the Employers, and correctly held that the Employers violated the Act by withdrawing recognition from the Union.

Termination of Fringe Benefit Contributions

The Employers' only contention before us regarding the fringe benefit funds is that the Union filed the fringe benefit charge with the Board outside the six-month period permitted for filing, and thus the allegation was barred. Section 10(b) of the Act prohibits the issuance of a complaint that is based on an alleged practice occurring more than six months prior to the charge. There is no question here that the separate charge regarding fringe benefits was filed on June 25, 1986, more than six months after the initial termination of contributions in November 1985. The Board held, however, that the original charge filed in February 1985 encompassed the fringe benefit allegation because it alleged violations of section 8(a)(5) of the Act caused not only by the refusal to bargain, but also by "other acts ... [which] interferred with, restrained, and coerced employees in the exercise of their rights guaranteed by Section 7 of the Act." The Board correctly held that the fringe benefit allegations fell under section 8(a)(5) and that the "other acts" language of the charge was sufficient to include the fringe benefit fund claims. Unfair labor practice charges are not construed as strictly as pleadings, and language such as that employed in the February charge has been found sufficient to include related acts. *NLRB v. Central*

Power and Light Co., 425 F.2d 1318, 1320 (5th Cir.1970). Thus the Board correctly accepted the July 1986 amendment of the February complaint, and the fringe benefit charge was not barred by section 10(b).

Reinstatement of Striking Employees

The Employers argue first that the offer to return to work received from the Union in December 1985 was not unconditional. Whereas economic strikers are entitled to reinstatement upon their unconditional offer to return to work, *Georgia Craft Co. v. NLRB*, 696 F.2d 931, 938 (11th Cir.1983), a conditional offer to return will not produce such an entitlement. *Swearingen Aviation Corp. v. NLRB*, 568 F.2d. 458, 463 (5th Cir.1978). The Employers allege that the Union conditioned the offer to return to work on the ratification of the contract by Union members. The letter sent to the Employers stated that "all employees make an unconditional offer to return to work" but it also mentioned that the contract offer was awaiting ratification by the employees. The Board accepted the ALJ's findings that oral statements by Union official Clowers further supported the assertion that the Union was making an unconditional offer to return to work; the statement regarding the ratification was not a condition, but a statement of fact. The employees were going to return to work prior to the ratification and, presumably, would work whether or not the Employers' final offer was eventually ratified. There is substantial evidence to support this conclusion by the Board.

The Employers also contend that their obligation to rehire the strikers was excused because they had

hired permanent replacements. Although it is true that the hiring of permanent replacements will excuse the obligation to rehire strikers, *see Hanson Bros. Enter.*, 279 N.L.R.B. No. 98 (1986), there is sufficient evidence to support the Board's conclusion that the Employers did not consider the replacement workers to be permanent. Officials for both Williams and Mosaic testified that they did not pay much attention to the replacements and that the replacements were hired in order to complete the jobs then underway. The ALJ's extensive findings supported the conclusion that the Employers did not consider the replacement workers to be permanent, and we therefore uphold the Board's determination that the Employers violated the Act by failing to rehire and delaying in the rehiring of certain strikers.

For the foregoing reasons, the Board's Order is

ENFORCED.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TILE, TERRAZZO & MARBLE CONTRACTORS ASSOCIATION OF ATLANTA & VICINITY AND ITS MEMBER WILLIAMS TILE COMPANY	:Case 10—CA—21572
TILE, TERRAZZO & MARBLE CONTRACTORS ASSOCIATION OF ATIANTA & VICINITY AND ITS MEMBER U.S. MOSAIC TILE CO	:Case 10—CA—21573
and	
TILE, MARBLE. & TERRAZZO FINISHERS & SHOPMEN, LOCAL UNION NO. 167	
TILE, TERRAZZO & MARBLE CONTRACTORS ASSOCIATION OF ATLANTA & VICINITY AND ITS MEMBERS WILLIAMS TILE COMPANY AND U.S. MOSAIC TILE CO.	:Case 10—CA—21804
and	
TILE, MARBLE & TERRAZZO FINISHERS & SHOPMEN, LOCAL UNION NO. 167	

DECISION AND ORDER

On 25 March 1987 Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondents and the General Counsel filed exceptions and supporting briefs and the Charging Party filed a brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] to modify the remedy,[3] and to adopt the recommended Order as modified.

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[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that the Respondents lacked good-faith doubt of the Union's majority status when they withdrew recognition, notwithstanding the evidence that some employees had abandoned the strike soon after it began, we do not rely, as he did, on an analogy to the specific presumption concerning the sentiments of strike replacements adopted in *Pennco, Inc.*, 250 NLRB 716 (1980). Pursuant to our decision in *Buckley Broadcasting Corp.*, 284 NLRB No. 113 (July 27, 1987), in which we overruled *Pennco*, we do not apply any specific presumption concerning the sentiments of returning strikers. Rather, we simply find that the Respondents have not proffered sufficient evidence concerning their employees' expressed desire to repudiate the Union as their bargaining representative to support a good-faith doubt of majority status and that the Respondents therefore have not rebutted the overall

1. The General Counsel has excepted to the judge's finding that the reinstatement rights for Thomas Allen were terminated as of the date of his unemployment compensation hearing, at which, according to Mosaic Vice President Thrower, Allen "went totally out of emotional and mental control" and engaged in verbal abuse toward all parties and the presiding officer. The General Counsel contends that it was the Respondent's own unlawful deeds that led to that hearing and, thus, precipitated Allen's behavior. Furthermore, the General Counsel contends that Allen's conduct at the hearing was an aberration and that he had been both a regular and good employee.

The evidence establishes that Thrower decided not to rehire Allen because of the behavior he exhibited at the hearing. This testimony was unrebutted and Allen was not called as a witness. However, the facts about what transpired at the unemployment compensation hearing have not been fully developed and the paucity of evidence regarding Allen's actual conduct prevents us from making an informed determination concerning his reinstatement rights. Under the circumstances, the decision concerning whether his conduct is sufficient to

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presumption of continuing majority status. *Buckley Broadcasting*, supra, slip op. at 17-18.

[3] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987), interest on and after 1 January 1987 shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to 1 January 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

terminate such rights would be better left to the compliance stage of this proceeding, when the parties will have the right to present further evidence on this issue.

2. The Respondents contend that a finding of a violation based on the discontinuance of fringe benefit contributions is barred by Section 10(b). We agree with the judge that the discontinuance of contributions is encompassed by the original charges filed in Cases 10—CA—21572 and 10—CA—21573 on 27 February 1986, alleging 8(a)(5) violations of the Act because of the Respondents' refusals to bargain and other acts. We therefore find it unnecessary to rely on the judge's alternative finding of a continuing violation under *Farmingdale Iron Works*, 249 NLRB 98 (1980), enfd. 661 F.2d 910 (2d Cir. 1981), with regard to the nonpayment of the benefit contributions.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Tile, Terrazzo & Marble Contractors Association of Atlanta & Vicinity, Williams Tile Company, and U.S. Mosaic Tile Company, Smyrna and Norcross, Georgia, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following to paragraph 2(a).

"The reinstatement rights of Thomas Allen will be established at the compliance stage of this proceeding."

2. Substitute the following for paragraph 2(c).

"(c) Make whole Frederick Folsom and Thomas Allen with interest, for any loss of pay they may have suffered as a result of the Respondents' unlawful delay in reinstating them from 2 January 1986, the date they should have been reinstated and, in the case of Thomas Allen, to a date to be established at the compliance stage of this proceeding."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. 16 December 1987

James M. Stephens, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN DOTSON, dissenting in part.

Contrary to my colleagues, I agree with the judge that Thomas Allen's reinstatement rights terminated as of the date of the unemployment compensation hearing.

Respondent Mosaic's vice president, Thrower, testified that he decided not to rehire striker Allen because of his outrageous behavior at the unemployment compensation hearing when he lost control of himself and verbally abused all the parties and the presiding officer. As the majority acknowledges, Thrower's description of events at the unemployment hearing was not contested by either the General Counsel or the Charging Party and Allen was not called as a witness. By failing to present rebutting testimony and to except to Respondent Mosiac's description of Allen's conduct, the General Counsel and the Charging Party waived any right to present a contrary version of the unemployment compensation hearing. In my view they also acquiesced to Respondent Mosaic's account of the events. Under these circumstances, there is no reason to prolong this case and allow the General Counsel and the Charging Party the opportunity to submit evidence at the compliance stage of this proceeding concerning Allen's behavior, thereby granting them the proverbial "second bite of the apple." Accordingly, in the absence of evidence that the decision not to rehire Allen was pretextual, I would find that Allen's reinstatement rights terminated as of the date of the unemployment compensation hearing.

Dated, Washington, D.C. 16 December 1987

Donald L. Dotson, Chairman
NATIONAL LABOR RELATIONS BOARD

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES
GOVERNMENT

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to reinstate economic strikers who have not been permanently replaced.

WE WILL NOT cease making contributions to the benefit funds required by our collective bargaining agreement from 1983 to 1985 with Tile, Marble & Terrazzo Finishers & Shopmen, Local Union #167.

WE WILL NOT refuse to recognize or bargain collectively with the aforesaid Local Union #167 as the bargaining representative of our employees in the following unit:

> All employees of all members of Tile, Terrazzo & Marble Contractors Association of Atlanta & Vicinity, to wit, Williams Tile Company and U. S. Mosaic Tile Co., performing work specified in Article IV of a collective bargaining agreement between the parties entered into on 1 October 1983 and terminating on 30 September 1985.

WE WILL NOT in any other like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate reinstatement to 11 economic strikers whom we should have reinstated on 2 January 1986, and WE WILL make whole those strikers and 6 other economic strikers whose reinstatement we unlawfully delayed for any loss of pay they may have suffered because of our discrimination against them, with interest.

WE WILL make whole our employees by making the fringe benefit contributions we should have made under our 1983-1985 collective bargaining agreement with the Union and which are now due or past due, and by reimbursing our employees for any expenses ensuing from our failure to make such contributions.

WE WILL recognize, and, upon request, bargain with the aforesaid Local Union #167 as the representative of the employees in the foregoing unit, and, if agreement is reached, embody it in a signed agreement.

TILE, TERRAZZO & MARBLE CONTRACTORS
ASSOCIATION OF ATLANTA & VICINITY
(Employer)

Dated:_____ By:_____
(Representative) (Title)

WILLIAMS TILE COMPANY
(Employer)

Dated:_____ By:_____
(Representative) (Title)

U. S. MOSAIC TILE CO.
(Employer)

Dated:_____ By:_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of this posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 101 Marietta Tower, Suite 2400, 101 Marietta Street, N.W., Atlanta, Georgia 30323. Telephone: (404) 331-2886.

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in Tile, Marble & Terrazzo Finishers & Shopmen, Local Union No. 167, or any other labor organization, by refusing to reinstate, or offer reinstatement to, economic strikers who have not been permanently replaced by other employees.

WE WILL NOT unilaterally cease making contributions to the benefit funds required by our collective-bargaining agreement from 1983 to 1985 with Tile, Marble & Terrazzo Finishers & Shopmen, Local Union No. 167.

WE WILL NOT refuse to recognize or bargain collectively with the aforesaid Local Union No. 167 as the bargaining representative of our employees in the following unit:

> All employees of all members of Tile, Terrazzo & Marble Contractors Association of Atlanta & Vicinity, to wit, Williams Tile Company and U.S. Mosaic Tile Co., performing work specified in Article IV of a collective bargaining agreement between the parties entered into on 1 October 1983 and terminating on 30 September 1985.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer immediate reinstatement to John W. Clark, George Jackson, Robert McDaniel, Carruth Price, Serlester Stanley, Charlie Atkins, Lorenzo Kendrick, Marshall B. Taylor, Gary L. Thurman, Joseph Brown, and Alberta Morris, and make them whole, with interest, for any loss of earnings they may have suffered as a result of our unlawful failure to reinstate them.

WE WILL make the following employees whole, with interest, for any loss of pay they may have suffered as a result of our unlawful delay in reinstating them from 2 January 1986, the date they should have been reinstated, until 13 January 1986 in the case of Larry Taylor; until 1 February 1986 in the case of D. W. Brown; until 10 March 1986 in the case of Janice McIvor; and until 26 May 1986 in the case of Errette Price.

WE WILL make Frederick Folsom and Thomas Allen whole, with interest, for any loss of pay they may have suffered as a result of our unlawful delay in reinstating them from 2 January 1986, the date they should have been reinstated, in the case of Frederick Folsom to the date he was reinstated and, in the case of Thomas Allen, to a date to be established at the compliance stage of this proceeding.

WE WILL make whole our employees by making the fringe benefit contributions we should have made under our 1983—1985 collective-bargaining agreement with the Union and which are now due or past due,

and by reimbursing our employees for any expenses ensuing from our failure to make such contributions.

WILL recognize and, on request, bargain with Local Union No. 167 as the representative of the employees in the aforesaid unit and, if agreement is reached, embody it in a signed agreement.

TILE, TERRAZZO & MARBLE CONTRACTORS ASSOCIATION OF ATLANTA & VICINITY, WILLIAMS TILE COMPANY, AND MOSAIC TILE COMPANY
(Employer)

Dated_____ By_____
(Representative) (Title)

WILLIAMS TILE COMPANY
(Employer)

Dated:_____ By:_____
(Representative) (Title)

U. S. MOSAIC TILE CO.
(Employer)

Dated:_____ By:_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any

questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Marietta Tower, Suite 2400, 101 Marietta Street, NW., Atlanta, Georgia 30323, Telephone 404-221-2886.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

TILE, TERRAZZO & MARBLE CONTRACTORS ASSOCIATION OF ATLANTA & VICINITY AND ITS MEMBER WILLIAMS TILE COMPANY	:	Case 10—CA—21572
and	:	
TILE, MARBLE & TERRAZZO FINISHERS & SHOPMEN, LOCAL UNION NO. 167	:	
TILE, TERRAZZO & MARBLE CONTRACTORS ASSOCIATION OF ATLANTA & VICINITY AND ITS MEMBER U.S. MOSAIC TILE CO.	:	Case 10—CA—21573
and	:	
TILE, MARBLE & TERRAZZO FINISHERS & SHOPMEN, LOCAL UNION NO. 167	:	Case 10—CA—21048
TILE, TERRAZZO & MARBLE CONTRACTORS ASSOCIATION OF ATLANTA & VICINITY AND ITS MEMBERS WILLIAMS TILE COMPANY AND U.S. MOSAIC TILE CO.	:	

and :

TILE, MARBLE & TERRAZZO :
FINISHERS & SHOPMEN, :
LOCAL UNION NO. 167 :

Gaye Nell Hymon, Esq., for the General Counsel.
Robert C. D. McDonald, Esq., Norcross, GA, for the Respondents.
Frank B. Shuster Esq., (Blackburn, Shuster, King & King), Atlanta, GA, for the Charging Party.

DECISION

Statement of the Case

HOWARD I. GROSSMAN, Administrative Law Judge. The original charges in Cases 10-CA-21572 and 10-CA-21573 were filed on 27 February 1986 against Williams Tile Company (herein Williams) and U. S. Mosaic Tile Company (herein Mosaic), respectively, by Tile, Marble & Terrazzo Finishers & Shopmen, Local Union #167 (herein the Union). Each charge alleged that the applicable respondent had refused to bargain in good faith with the Union in violation of Section 8(a)(5) of the National Labor Relations Act (herein the Act), and had, by these "and other acts," restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.[1]

The Union filed amendments to the foregoing charges on 22 May 1986, in evidence repeating the same allegations, but with each of the respondents listed as a

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[1] G.C. G.C. Exhs. 1(a), 1(c).

member of the Tile, Terrazzo & Marble Contractors Association of Atlanta & Vicinity (herein the Association).[2]

On 5 June 1986, the Union filed an original charge in Case 10-CA-21804 alleging that the Association, through its members Williams and Mosaic (collectively designated Respondents herein), had discriminatorily refused to reinstate economic strikers subsequent to their unconditional offer to return to work, in violation of Section 8(a)(3) of the Act.[3]

On 25 June 1986, the Union filed a charge in Case 10-CA-21850, not captioned above, alleging that the Association had violated Section 8(a)(5) of the Act by unilaterally discontinuing fringe benefit contributions to employees in the applicable bargaining unit.[4] Thereafter, on 28 July 1986, the Union submitted a withdrawal request containing the legend that same was being submitted "per advice of Region to amend into Case 10-CA-21572,"[5] and, on 30 July 1986, the Regional Director for Region 10 approved the request.[6]

On 28 July 1986, the Union filed second amended charges in Cases 10-CA-21572 and 10-CA-21573 alleging that the Association, and Williams and Mosaic,

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[2] G.C. Exhs. 1(e), 1(g).

[3] G.C. Exh. 1(n).

[4] C.P. Exh. 1

[5] C.P. Exh. 2.

[6] R. Exh. 1.

respectively, had additionally violated the Act by unilaterally discontinuing fringe benefits for employees in the bargaining unit.[7] And, on the same day, 28 July, the Union amended its charge in Case 10-CA-21804 so as to include Williams and Mosaic with the Association as parties charged with discriminatory refusal to reinstate strikers.[8]

After issuance of complaint on 30 May 1986, an amended consolidated complaint issued on 31 July 1981. As further amended at the hearing, it alleges that 19 of Respondents' employees[9] engaged in an economic strike beginning 19 November 1985, that the Union made unconditional application on behalf of said employees for their return to work on 20 December 1985, and that Respondents discriminatorily refused to reinstate them in violation of Section 8(a)(3). The complaint acknowledges that three of the alleged discriminatees were reinstated after their application for return to work.[10]

The complaint also alleges that the Respondents violated Section 8(a)(5) of the Act, beginning 29

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[7] G.C. Exhs. 1(p), 1(r).

[8] G.C. Exh. 1(t).

[9] Bobby Brown, John W. Clark, George Jackson, Robert McDaniel, Carruth Price, Serlester Stanley, Frederick Folsom, Thomas Allen, Charlie Atkins, Larry Durden, Lorenzo Kendrick, Janice McIvor, Larry D. Taylor, Marshall B. Taylor, Gary L. Thurman, Errette Price, D. W. Brown, Joseph Brown, and Alberta Morris (G.C. Exh. 1(v)).

[10] Janice McIvor, 12 March 1986; Errette Price, 26 May 1986; and Larry Taylor, 13 January 1986 (G.C. Exh. 1(v), par. 16).

November 1985 and thereafter, by refusing to make required contributions to health and welfare, vacation, and pension funds as required by an existing collective bargaining agreement, and, beginning 20 December 1985 and thereafter, by refusing to bargain with the Union as the representative of employees in an appropriate unit.

A hearing was held before me on these matters in Atlanta, Georgia, on 28 August, and 29 and 30 September 1986. Thereafter, the General Counsel, the Charging Party, and the Respondents submitted briefs. Upon the entire record, and upon my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. Jurisdiction

The pleadings establish that Williams and Mosaic are both Georgia corporations, that Williams has an office and place of business at Smyrna, Georgia, and Mosaic one at Norcross, Georgia, at which locations they are engaged in the installation of tile, terrazzo, marble, and slate, and that during the calendar year preceding issuance of the complaint each of them purchased and received at its respective place of business materials and supplies valued in excess of $50,000 directly from suppliers located outside the State of Georgia.

The pleadings also establish that the Association is an association representing members who install tile, terrazzo, marble, and slate, that it represents said members in collective bargaining with the Union, and

that Williams and Mosaic have been members since 1 October 1983. Evidence adduced at the hearing establishes that Williams and Mosaic are the only members of the Association.

I conclude the Association, Williams, and Mosaic are each employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, and the answer denies, that the Union is a labor organization. James E. Clowers, the Union's financial secretary and business manager, credibly testified that the Union exists for the purpose of dealing with employers concerning its employee members' rates of pay, hours, wages, grievances, and working conditions. I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background — The Collective Bargaining Agreement

Prior to formation of the Association in 1983, the Union represented employees of Williams and Mosaic for about 20 years. Then, in 1983, the Union and the Association, on behalf of its members, entered into a 2-year collective bargaining agreement effective 1 October 1983, and ending 30 September 1985. The Association recognized the Union as the collective bargaining representative of all employees of employer members of

the Association performing work traditionally considered to be within the Union's work jurisdiction.[11]

B. The Bargaining For a New Agreement the Discontinuance of Benefit Payments, the Wage Reduction, and the Strike

Bargaining for a new agreement began in mid-August 1985, and there were nine or 10 bargaining sessions before they were discontinued on about 12 November. According to Union Business Manager Clowers, the Association proposed a wage cut at the first meeting, and this subject was discussed at four or five meetings. Clowers contended that the parties reached agreement on all issues except wages. The Association's final offer, given on 12 November, was $9 hourly plus 86 cents in fringe benefits. Clowers contended that, although there were a few other open items, the Association's representatives assured the Union that these matters "would take care of themselves" if agreement could be reached on wages.

Association Chairman Kenneth R. Williams, founder and president of Respondent Williams, testified that three other items had not been agreed on in addition to wages—work jurisdiction, checkoff, and retroactivity of benefits. According to Williams, it was union counsel who said that they could "work out" these matters if agreement could be reached on wages.

With respect to this conflicting evidence, I need not decide whether the parties reached agreement, since there is no such allegation in the complaint.

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[11] G.C. Exh. 2.

During the bargaining from the termination date of the contract on 30 September until the beginning of the strike on 19 November, Respondents continued making contributions required by the contract to pension, health and welfare, vacation, and promotional funds. During the last week of November, i.e., after the beginning of the strike, Respondents discontinued making these contributions, and have not resumed them. Association Chairman Kenneth R. Williams agreed at the hearing that Respondents had not proposed discontinuing these benefits during bargaining, and that the parties had not been at impasse over this issue.

On about 20 November 1985 — also just after the beginning of the strike — Respondents reduced the wage rate from the contractual amount of $10.59 to $9. Unlike the discontinuance of the fringe benefits, the wage reduction is not alleged to be a violation of the Act.

The complaint alleges that the alleged discriminatees and others ceased work concertedly and engaged in an economic strike against the Respondents on about 19 November 1985. The answer admits only that the alleged discriminatees ceased work, and Respondents' counsel contended at hearing that the existence of a strike had not been proved. However, there is abundant evidence in the record, including testimony of Respondents' witnesses, to establish that the employees did engage in a strike that started on 19 November (a Wednesday) and ended on 19 December

1985. It is also obvious that they struck over the wage issue, and, accordingly, were economic strikers.[12]

A majority of the strikers returned to work a few days after the strike began. Williams' president, Kenneth R. Williams, testified that he had 50 employees in the bargaining unit represented by the Union at the time of the strike.[13] According to Williams, 35 of the strikers returned to work the following Monday, i.e., 24 November 1985.

Mosaic's vice president, James G. Thrower, affirmed that he had about 30-32 employees at the time of the strike, and that 19-20 of them returned to work the following Monday.

C. Respondents' Hiring of Replacements

1. Williams' replacements

(a) Summary of the evidence

There is conflicting evidence on the number of replacements which Williams hired. The factual issue is whether it hired at least 10 replacements, because, as appears hereinafter, this is the number of remaining strikers who applied for return to work. Although it is clear that many new employees were hired, Williams appears to contend that they were not "unit employees."

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[12] The Respondents' motion to dismiss the complaint on the ground that the alleged discriminatees have not been proved to be strikers is denied.

[13] See section C, infra, on the conflicting evidence of unit employees at the time of the strike.

Williams submitted a document which, Kenneth R. Williams testified, showed the Company's payroll for 22 November 1985, just as the strike was starting.[14] There are varying pay rates on this list. According to Williams, unit employees may be identified by the pay scale of $10.59 the contract rate. Utilizing this method of identification, there were 39 employees in the unit. However, as noted above, Williams testified that he had 50 employees when the strike started.

Another oddity is that there is no discernible reason for the different pay rates. Thus, on the first page of the report, Benjamin Anderson is listed as working at "Davidson's, North Cobb - Interiors" at $10.59 hourly, while Miles E. Bagwell was working at the same jobsite at $13.27. The digits "4370," possibly a job classification number, appear under Anderson's name, but the same digits also appear under Bagwell's.

The only difference between Anderson and Bagwell discernible from the record is the fact that the former's name appears on a pension fund report to the Union just as the strike was beginning,[15] while the latter's does not. Many of the alleged discriminatees' names appear on the pension fund report. Further examination reveals that all employees appearing on the pension fund report, i.e., union members, were paid at the contract rate of $10.59 hourly, while all other employees, i.e., new employees, were paid at higher

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[14] R. Exh. 4.

[15] Jt. Exh. 14.

rates.[16] Adding all employees working at jobsites regardless of their pay, a total of over 70 employees were apparently engaged in unit work.

The Company's "employee distribution" report for 6 December — about midway in the strike — shows about 68 employees engaged in work at jobsites.[17] Of these, 15 appear on the November pension fund report.[18] The rest, I infer, were replacement employees. The same general results are indicated in a payroll for the period ending 31 December 1985 — after the strike had ended and the Union had made an offer of return to work on behalf of the strikers.[19] There are similar results in the first pay period for 1986.[20]

In addition to this evidence, Williams submitted a document purporting to be a compilation of its records showing new employees hired beginning December 1985. The document shows 5 employees hired in that month, none in January, and, 50 others in 1986, most of them in the late spring and summer.[21] Kenneth R.

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[16] R. Exh. 4.

[17] Jt. Exh. 15.

[18] Jt. Exh. 14.

[19] Jt. Exh. 22. Of a total of over 75 employees employed at jobsites for the period ending 31 December, 28 appear on the pre-strike pension fund report (Jt. Exh. 14).

[20] R. Exh. 5. Over 75 employees were at work at jobsites in the first period of 1986. Of these, 31 are listed on the pre-strike pension report (Jt. Exh. 14).

[21] R. Exh. 6.

Williams claimed that these were the striker replacements.

(b) Factual analysis

It is unlikely that the new hires during and immediately after the strike were doing work which was different from that done before the strike. There is no evidence, other than the different pay scales and Kenneth R. Williams' testimony, to indicate this. The documents themselves show that all nonadministrative personnel were paid for work at different jobsites. Respondent Williams' purported compilation of its own records[22] has far less probative weight than those records themselves. As indicated, they show that Williams, during and after the strike, employed far more new hires than the 10 strikers who applied for return to work. I conclude that all the remaining strikers were replaced, and that work was available for them when application for their return was made by the Union, as appears hereinafter.

There is no evidence in the record to indicate that Williams considered its new employees to be "permanent" replacements, or that it ever said this to the new employees. Kenneth R. Williams merely testified at that he saw "new faces coming," but "didn't pay any attention."

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[22] R. Exh. 6.

2. Mosaic's replacements

As appears hereinafter, eight Mosaic strikers applied for reinstatement. The factual issue is whether the Company hired at least this number of replacements.

As indicated, Mosaic's Vice President Thrower testified that he had about 30-32 employees at the time of the strike on 19 November 1985, and that 19-20 of them returned to work the following Monday, 24 November. A pension fund report for November 1985, submitted by the Company to the Union, shows 32 employees.[23] Mosaic also submitted lists of employees for five pay periods in December 1985 and for subsequent pay periods. The December lists[24] give the names of two employees who do not appear on the November pension fund report[25] and the payroll for the period ending 8 January 1986 shows 13 employees out of a total employee complement of 31[26] who do not appear on the pre-strike pension fund report.[27]

I conclude that during the last pay period for December 1985, Mosaic was employing at least two replacement employees, that it was employing more than eight such employees during the first pay period

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[23] Jt. Exh. 7.

[24] Jt. Exh. 1.

[25] Jt. Exh. 7.

[26] Jt. Exh. 2.

[27] Jt. Exh. 7.

in January 1986, and that work was available at that time for the eight Mosaic employees on whose behalf the Union applied for return to work.

There is nothing in the evidence to show that Mosaic considered the new employees to be "permanent" replacements, or that it ever said this to them. All that Mosaic's Vice President Thrower testified about the matter is that the Company "replaced the strikers immediately with non-union members to keep the jobs going, and then as these jobs faded out and others became available, we replaced them with more...of the union strikers." If anything, this evidence indicates that Mosaic did not consider the new employees to be permanent replacements.

D. The Union's Offer on Behalf of Strikers to Return to Work, and Union Acceptance of the Employers' Contractual Terms — the Respondents Responses

1. The Union's letter of 20 December, and Business Manager Clowers' conversations with Respondents' representatives

(a) Summary of the evidence

Under date of 20 December 1985, Union Business Manager Clowers sent the following letter to Association Chairman Kenneth R. Williams with a copy to Mosaic's Vice President Thrower:

> This letter is to officially inform you that all employees hereby make an unconditional offer to return to work. The Union is prepared to accept your final offer and to recommend it to the membership for its ratification. It is understood that the final offer is Nine Dollars ($9.00) per hr.

> plus Eighty Six Cents ($.86) in fringe benefits. It is further understood that the current pay difference per hr. between a Tile or Marble Finisher and a Terrazzo Finisher, or base machine operator is to remain in effect. All other items were previously agreed to and it is our contention that we now have a contract which should be reduced to writing for signature.[28]

Mosaic's Vice President Thrower acknowledged that he received a copy of this letter on about 22 or 23 December 1985. According to his testimony at the hearing, he read the letter and came to the conclusion that the offer to return to work was not unconditional, because the contract would have to be ratified before the employees' return to work. Thrower asserted that he reached this conclusion on the day he read the letter, without consulting with counsel or with Association Chairman Kenneth R. Williams, who was out of town.

Business Manager Clowers testified that he unsuccessfully tried to call Association Chairman Kenneth R. Williams about a week after mailing the letter. Later, the same day, Clowers called Mosaic's Vice President Thrower, who acknowledged receipt of the letter. According to Clowers, Thrower said that he had "no objection" to the letter, but would have to talk to Association Chairman Williams about it. However, Thrower continued, he did not see why the parties were refraining from signing the agreement since the Union was accepting it. Clowers replied "that it (the contract) would have to be voted on by the members . . . , but

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[28] G.C. Exh. 3.

we were making an offer to return to work." Thrower again stated that he would have to consult with Williams, and would get back with Clowers.

Thrower testified that he had a telephone conversation with Clowers after receipt of the letter. He told Clowers that he had not had enough time to look at it, and denied telling Clowers that he saw no reason why a contract should not be signed. However, "as to its content, I told him (Clowers) it was all right, but with Mr. Williams being out of town . . ., no official comment could be made on it."

Business Manager Clowers testified that he finally reached Association Chairman Williams by phone on 3 January 1986, and asked his position on the 20 December letter. Williams replied that he had not had an opportunity to read the letter, and invited Clowers to explain it. Clowers replied that the Union would accept the Association's final offer subject to ratification, but had made an unconditional offer to return to work. Williams rejoined that he doubted that the Union represented a majority of the employees. He said that he had to discuss the matter with his attorney, and would get back to Clowers. The latter did not hear further from Williams.

A week later, on 10 January according to Clowers, he called Mosaic's Vice President Thrower and asked whether he had had an opportunity to discuss the letter with Williams. Thrower said that he had not talked with Williams but would attempt to do so. Clowers asked Thrower to let him know Mosaic's position, but heard nothing further from Thrower.

Kenneth R. Williams testified that the date stamped on his copy of the Union's letter shows that it was received by Williams on 27 December 1985.[29] The Association's chairman asserted at the hearing that he did not consider the letter to be an unconditional offer to return to work. Nonetheless, he also testified that he told his supervisors to rehire the strikers. The reason, Williams asserted, was that this instruction was given prior to his reading of what he termed the Union's contradictory letter.

Kenneth R. Williams acknowledged that he had a conversation with Business Agent Clowers the first week of January 1986. He asserted that he told Clowers that he doubted that the Union represented a majority of the employees. Although Williams contended at the hearing that the Union's 20 December letter was ambiguous, he did not dispute Clowers' testimony that the latter explained the letter and its "unconditional" offer to return to work in their January conversation.

Williams testified that one of the reasons for his asserted doubt of the Union's majority status was a decertification petition in his possession at the time of his conversation with Clowers. Williams affirmed that he discussed the petition with Mosaic's Vice President Thrower and with counsel at the time he received it.

As noted above, Clowers contended that he called Thrower on 10 January 1986, and that the latter told him he had not talked with Williams. The latter's

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[29] R. Exh. 2.

testimony, however, shows that the two employer representatives had talked. Thrower testified that he had "several conversations" with Clowers subsequent to the first conversation in the last week of December 1986. During those conversations, Thrower contended, he told Clowers that the Union did not represent a majority. Thrower did not rebut Clowers' testimony that, in the conversation on 10 January, Thrower told Clowers that he had not talked with Williams.

By letter dated 28 January 1986, the Union notified the Association that the Union's membership had accepted the last offer, and that an agreement should be executed.[30] Respondents did not answer.

(b) Factual and legal analysis — the validity of the Union's offer to return to work

Mosaic Vice President Thrower's testimony that, upon receipt of the Union's letter, he concluded that the Union had not made an unconditional offer to return to work, is inconsistent with his admission that he told Union agent Clowers that the substance of the letter was "all right." It is unlikely that Thrower would have given tentative approval of the letter if he doubted the date of the employees' return to work and the unconditional nature of the Union's offer. Accordingly, I do not credit Thrower's testimony that his asserted doubts about the validity of the Union's offer first began in the last week of December. I credit Clowers' testimony that Thrower said he had "no objection" to

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[30] G.C. Exh. 4.

the letter, but would have to talk to Williams about it before taking a final position.

I credit Clowers' testimony that Thrower said he saw no reason why the parties were refraining from signing an agreement, because Clowers was a more reliable witness than Thrower.

I credit Clowers' testimony, partially corroborated by Kenneth R. Williams, that the two of them talked on 3 January 1986. Clowers told Williams that the Union was accepting Respondents' last offer subject to ratification, but in the meantime had made an unconditional offer to return to work. Williams replied that he doubted the Union's majority status, would consult with his attorney, and get back to Clowers. He did not do so.

I also credit Clowers' unrebutted testimony about his explanation of the Union's letter in his conversation with Thrower in late December. In each of these conversations with Williams and Thrower, Clowers distinguished between the offer to return to work and union acceptance of the contract. Although the latter had to be ratified by the union membership, Clowers said that the Union was making an unconditional offer to return to work.

The plain language of the Union's letter does not link the offer to return to work with ratification of the proposed contract. The letter asserts that "all employees hereby make an unconditional offer to return to work." Because of this language, Clowers' explanation of it to Williams and Thrower, and Thrower's testimony that he told Clowers that the substance of the letter was all

right, I do not credit Williams' and Thrower's testimonies that they considered the offer to return to work to be conditional on ratification of the contract.

The Supreme Court has stated that "[t]he right to reinstatement does not depend upon technicalities relating to application."[31] The Board has concluded with judicial approval that verbal requests to return to work, some made on the telephone, constituted valid requests for reinstatement.[32] In one case, the Board found that the appearance of strikers at the plant constituted an offer to return to work.[33] In another case, an ambiguous conversation between a striker and a supervisor made it clear under the circumstances that the striker intended to return to work.[34] The Board has recently concluded that a return-to-work offer was unconditional even though it was coupled with a demand for discharge of striker placements.[35]

It follows a fortiori, based on the clarity of the language of the Union's 20 December letter and Business Agent Clowers' explanations of it, that the Union made an unconditional offer of immediate

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[31] *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 66 LRRM at 2739 (1967).

[32] *Albritton Engineering Corporation*, 138 NLRB 940 (1962), enfd. as modified 340 F.2d 281, 58 LRRM 2159 (5th Cir. 1965); *Hartmann Luggage Company* 183 NLRB 1246 (1970), enfd. as modified 458 F.2d 178, 79 LRRM 2139 (6th Cir. 1971).

[33] *Sunbeam Lighting Company*, 136 NLRB 1248 (1962).

[34] *Colonial Manor Convelescent & Nursing Home*, 184 NLRB 693, 696 (1970).

[35] *Hansen Brothers Enterprises*, 279 NLRB No. 98 (1986).

return to work on behalf of the remaining strikers identified above,[36] and that the Respondents so understood it. The Respondents did not respond with any reinstatement offer to the Union.

E. Respondents' Conversations with Strikers

1. Summary of the evidence

The Respondents deny the complaint allegation that they failed to reinstate the 19 alleged discriminatees named in the complaint.[37] Respondents elicited evidence intended to establish that they made reinstatement offers to various strikers. Twelve of the 19 alleged discriminatees testified at the hearing.

None of the alleged reinstatement offers was made in writing, according to Respondents' witnesses. The contract provides for a hiring hall. Although Respondents had utilized it in the past, they did not use it in this instance in an effort to find and reinstate strikers. Williams' President Kenneth R. Williams testified that he instructed field superintendents Britt Williams and Harold Winfrey to reinstate strikers, but did not follow up on these instructions. Britt Williams and Winfrey said that they had no knowledge of the Union's reinstatement offer.

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[36] Supra, fn. 9.

[37] Supra, fn. 9.

(a) Williams' employees

(i) Alleged reinstatement offers during the strike — Carruth Price, Joseph Brown. and D. W. Brown

Williams' evidence suggests that three of the asserted reinstatement offers were made while the strike was still in progress, i.e., that Williams solicited strikers to return to work. Thus, field superintendent Britt Williams testified that he talked to striker Carruth Price "shortly after" the strike began (19 November), in "part of the first of December," or "between the first and second week of December." The conversation took place in the Town Center Mall in Cobb County, where Williams was engaged in a job for Macy's department store.

According to field superintendent Britt Williams, Price approached him in the mall and asked whether he could come back. "Sure, come on back" was Williams' asserted reply. However, Price never returned. Williams also contended that he sent a message to Price by an employee named James Bynum, after 1 January 1986. The message was to have Price call Williams. Williams said that he never heard from Price. He also agreed that he made no further inquiry of Bynum about the matter.

Price denied (1) any personal contact with Williams about going back to work at any time, (2) any offer of reinstatement by Williams or any refusal on Price's part to accept same after the strike ended, and (3) any refusal to accept reinstatement in early 1986.

Field superintendent Britt Williams also testified that he had a conversation with striker Joseph Brown at

the Town Center Mall "probably a week" after his asserted conversation with Price, i.e., in about mid-December 1985. He offered Brown a job as a helper. Williams does not assert any response from Brown at this time. Later, in about March 1986, Brown called Williams, and asked for a job as a tile setter, a job not covered by the contract. Williams replied that he did not have any openings for that job at the time, but offered Brown a job as a helper. According to Williams, Brown replied that he "wanted to go a little bit further" as a tile setter or apprentice.

Striker Joseph Brown testified that he had been employed as a helper and finisher. He called field superintendent Britt Williams about 2 or 3 weeks after the strike ended, and asked whether they were going back to work. Williams replied that there was nothing available. Brown denied that he asked to come back as a tile setter in this conversation. About 6 or 7 months later, Brown called again, and Williams replied that he had nothing — the Company had hired new employees. Williams said, "if we have anything open as a helper, I'll call you." Brown then asked for work as a tile setter, but Williams never offered him a job as a helper or a tile setter.

In addition, field superintendent Williams testified that he had a conversation with striker D. W. Brown "two weeks after people started coming back to work." The latter expression is ambiguous since it may mean weeks after the strike began, or 2 weeks after it ended. However, the strike began on 19 November, and most of the employees began returning to work on 24 November. This suggests that Williams meant that the

alleged conversation with D. W. Brown took place in the first half of December 1985, i.e., during the strike. Williams also ambiguously placed the date of this conversation about 3-4 weeks later. On cross-examination, however, the witness testified that his first contact with Brown was "probably two weeks after the strike." The conversation took place on the telephone. According to Williams, he asked Brown whether he was "coming back or not." Brown replied that he would be back "when all this thing blows over." This asserted answer also suggests that any such conversation took place during the strike.

Brown testified that Britt Williams sent word for him to call Williams "about the first of February" (1986). Brown did so, and Williams asked whether he was coming back to work. Brown replied affirmatively, but then spoke with Business Manager Clowers. The latter informed Brown that no contract had been signed, but also said that Brown could use his own judgment about returning to work. Brown decided not to do so.

(ii) John W. Clark

Field superintendent Williams asserted that he saw striker John W. Clark working on a job about 1 March 1986, "or a good bit after that" and told him that he could "come back" if he was "unhappy" with his other job. According to Williams, Clark never came back.

Clark testified that he called Williams immediately after the strike ended, and offered to return to work. Williams replied that he did not have anything at that

time, but had something coming up soon. Clark denied that anybody from Williams ever called him again.

On cross-examination, Clark was asked the following questions and gave the indicated responses:

> Q. So isn't it a fact, Mr. Clark, that you had been offered to go back to work, that you called Mr. Clowers to see if you could go back to work or if you were still on strike, and he told you to do whatever you wanted but that no agreement had been signed; isn't that correct?
>
> A. Right.
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> * * *
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> Q. And you do, sir, now acknowledge upon your oath that you were offered reinstatement at Williams Tile Company, won't you?
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> A. No. No. I called Britt Williams, and I — my call was never returned. He never called me back and said to come back to work.

On redirect examination, Clark again testified that Williams never offered him a job after the strike.

(iii) Marshall Taylor

Striker Marshall Taylor testified that, immediately after the strike ended, he made an offer to return to work to Williams' President Kenneth R. Williams, in the Company's office. Williams told him to talk to field superintendent Harold Winfrey. Taylor did so, and Winfrey told him that they "didn't have anything," but that Winfrey would call Taylor. The latter testified that he has not received any such call. Later, in 1986, Taylor called again and spoke to an individual whom he

identified as Kenneth Williams, Jr. Taylor was told that "they didn't have anything."

Williams' President Kenneth R. Williams corroborated Taylor's testimony. Thus, he testified that Taylor came to his office and asked for a job. Williams testified that he told Taylor that he would advise Winfrey that Taylor was available, and that he did so advise Winfrey. The latter denied that he ever saw Taylor after the strike, and agreed that he has not offered reinstatement to Taylor.

Field superintendent Winfrey testified that he was reluctant to rehire or recall Taylor because he had heard that Taylor made disparaging remarks and threats about the Company. Winfrey could not provide the details of such remarks or threats, and did not recall the source of the information. On recross examination he added absenteeism as another reason for the failure to recall Taylor.

(iv) Gary L. Thurman

Williams' field superintendent Winfrey testified that Thurman was "separated" on 25 October 1985 because of a lack of work. This testimony is supported by an unsigned "Separation Notice."[38] According to Winfrey, he did not recall Thurman to work because the Company "wasn't in need of ... additional help at the time." He denied that Thurman ever came to him and asked to be put back to work, and admitted that Williams did not offer him reinstatement.

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[38] R. Exh. 8.

Winfrey also testified that layoffs are frequent in the tile, marble, and terrazzo industry, and that the same employees are recalled when work becomes available. Williams has engaged in this practice in the past. Williams' President Kenneth R. Williams asserted that he had a "cyclical" business, that he does not carry employees as such on company records during layoffs, and that the same employees come back after layoffs only "occasionally." However, the Company's monthly pension reports to the Union before the strike show continuous employment for most employees during weekly pay periods.[39]

Gary L. Thurman testified that he was working for Williams on a job for Macy's, and that they were waiting for "some stone" to arrive within the next few weeks. He received a layoff slip on 25 October. Thurman stated that he has in the past been laid off by Williams pending receipt of equipment and materials, and has been recalled immediately when it arrived. He expected to be recalled in this instance.

According to Thurman, although he was not actually working when the strike began (19 November), he joined the strike.

Thurman further affirmed that he did not receive any reinstatement offer from the Company. On three occasions, according to Thurman, he asked field superintendent Winfrey to be returned to work. On the first such occasion, in January 1986, Winfrey said that

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[39] Jt. Exhs. 9-14.

he did not have any work at the time, but would have some soon. During the second call a week later, Winfrey said that they had not received the stone and equipment and had not "started up the (Macy's) job yet." During the last call, Winfrey told Thurman that his services were no longer needed, and suggested that he seek other employment.

(v) Bobby Brown

The issue is whether Bobby Brown was laid off because of lack of work with reasonable expectation of recall, or discharged because of absenteeism. There are two Separation Notices in evidence, both dated 8 July 1985. One of them is signed by field superintendent Winfrey, and "lack of work" is checked as the reason for separation. There is a blank space on the form for reasons other than lack of work. In this space are markings indicating that a word had been written there and then obliterated.[40] The other Separation Notice is unsigned, and states that excessive absenteeism was the reason for the separation.[41]

Field superintendent Winfrey was asked by Respondents' counsel[42] the reason for Bobby Brown's separation. He answered: "We separated Mr. Brown under separation notice of lack of work." Winfrey was

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[40] G.C. Exh. 5.

[41] R. Exh. 7.

[42] The transcript is hereby corrected so as to strike the word "BY MR. SHUSTER" in line 3 on page 208, and substitute in lieu thereof the words "BY MR. McDONALD."

then asked to explain the two reasons appearing on Brown's separation notices. The witness answered that Brown was absent 1 or 2 days a week, and that Winfrey made the decision to terminate him for this reason. However, when Winfrey talked to Brown's foreman, he discovered that the records of the asserted absenteeism varied so much that the company decided to give lack of work as reason. Winfrey agreed that the notice showing lack of work as the reason was the only notice issued to Brown.

Brown's testimony is unclear and confusing. He was a helper, and prior to July 1985 had previously been laid off and then recalled, normally 3-4 weeks after layoff. Asked whether he had been "discharged" in July for absenteeism, Brown answered both affirmatively and negatively. He stated that it had "not been said" to him that he had been discharged, and referred to the lack of work reason given on his separation notice. On the other hand, Brown also testified that the Company on occasion gives lack of work as a reason so that an employee can collect unemployment compensation benefits. Brown also stated that he did not know the reason for his discharge, and, referring to his practice of riding to work with another employee, appeared to be denying the allegation of absenteeism.

Describing his last day of work in early July 1985, Brown testified that Winfrey "got mad with" him, said that he was going to give Brown "his papers," and advised Brown to save his money because "things were going to get rough." Although Brown testified that he

asked for work without success after his last day of work, he was unclear about the dates.

Williams' records show an almost identical complement of employees, minus Brown, from June through November 1985.[43]

(vi) Robert P. McDaniel

McDaniel described the Union's offer to return to work on his behalf, but did not make any individual offer to return. The Company did not offer him reinstatement.

After the strike, it was McDaniel's belief that the parties were still negotiating. He interpreted the Union's position to be that the strikers would go back to work if the Company signed a contract.[44] McDaniel stated that it was his desire to return to work when the Union had obtained a contract.

(vii) George Jackson

Jackson participated in the strike. About a week after it began, according to Jackson, he "left the strike" and accepted a job with Goodyear. He was unaware of the Union's offer to return made on behalf of the strikers, and did not himself make an offer to return. No one from the Company made a reinstatement offer to him. Jackson said that he would not have returned to

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[43] Jt. Exhs. 9-14.

[44] McDaniel's opinion concerning the Union's offer to return to work is erroneous, for the reasons given above.

work with a pay cut.[45] Nonetheless, Jackson added, he continued to participate in union meetings because he did not know how long he was "going to last at Goodyear."

(b) Mosaic's employees

(i) Charlie Atkins

Atkins was a striker, and testified that Business Manager Clowers informed the members in December 1985 that they could return to work if they wished to do so. Atkins received no offer from Mosaic. On 1 April 1986, Atkins averred, he called John Mion, Jr., whom he identified as Mosaic's president, and asked to go back to work. Mion replied that he did not have anything for Atkins to do at the time. Mosaic's Vice President Thrower testified that, to "his knowledge," Atkins never asked for reinstatement. Mion did not testify.

(ii) Janice McIvor

McIvor at one time worked for Williams, but at the time of the strike, which she joined, she was working for Mosaic. McIvor testified that she appeared at the plant and asked Mosaic's Vice President Thrower for work on 10 January 1986, but was told that no work was available. Two subsequent telephone calls to Thrower or his secretary had the same results. McIvor called again on 9 March 1986, and, after an initial

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[45] As indicated, Respondents reduced wages on 20 November from the contract rate of $10.59 to $9.

rejection, received a call from Thrower offering her reinstatement. She returned to work the next day, i.e., 10 March 1986.[46]

(iii) Alberta Morris

Morris was previously employed by Williams, but was working for Mosaic at the time of the strike, which she joined. She went with Janice McIvor to ask Mosaic's Vice President Thrower for a job in early January 1986. Thrower said that materials for a job were not available. A few weeks later, Morris talked with Thrower again, and he suggested that she apply at another firm for work. Morris did so, but no work was available. Thereafter, Morris called Mosaic's office a few times, and left her name. She did not receive an offer to return to work, according to her testimony.

Mosaic's Vice President Thrower testified that he did not himself offer reinstatement to Morris. Counsel sought to elicit testimony from Thrower that a foreman, on Thrower's direction, tried to contact Morris. When the Charging Party objected on the grounds of hearsay, Mosaic's counsel stated that the sole purpose of the testimony was to establish Thrower's direction to the foreman, and the latter's report to Thrower, not the truth thereof.[47] Accordingly, Thrower testified that the foreman called Morris to report to work, and that she did not do so.

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[46] McIvor was subsequently laid off again, but this layoff is not alleged to be a violation of the Act.

[47] Respondents' counsel stated that the foreman "might be a flat-out, 100 percent liar."

2. *Factual and legal analysis*

(a) Employees of Respondent Williams

(i) Price, Joseph Brown D. W. Brown

I credit Carruth Price's denial that he received a reinstatement offer from Williams. Field superintendent Britt Williams was a less believable witness than Price. Williams' failure to ask employee Bynum whether the latter passed a message to Price from Williams casts further doubt on the latter's testimony. Respondents' asserted evidence is also questionable in general because it presents one-on-one conversations with individual strikers without any written response to the Union's letter offering a return to work, and, indeed, without any knowledge of such letter by field superintendents Britt Williams and Winfrey.

Williams' testimony, even if credited, would not establish an offer of reinstatement, because the alleged conversation took place during the strike. The Board has held that in certain circumstances solicitation of strikers to return to work may be violative of Section 8(a)(1) of the Act.[48] There is no complaint allegation of this nature in this case, but it follows a fortiori that solicitation of strikers to return to work, made during the strike, do not constitute effective offers of reinstatement terminating Respondents' obligation to make such offers after the strike and after an offer to

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[48] *Ramona's Mexican Food Products*, 203 NLRB 663, 682 (1973), enfd. 531 F.2d 390 (9th Cir. 1975); *Ramada Inn South*, 206 NLRB 210, 219 (1973); *Sam'l Bingham's Son Mfg. Co.* 80 NLRB 1612, 1613-1614 (1948). Cf *Romo Paper Products Corp.*;, 208 NLRB 644 (1974)

return to work. Accordingly, I find that Williams did not make an individual offer of reinstatement to Price.

I credit Joseph Brown's testimony that he asked field superintendent Britt Williams for work about 2 or 3 weeks after the strike ended, and that the latter said that there was no work available. I do not credit Williams' testimony that he offered a job as a helper to Joseph Brown in mid-December 1985. Even if made, it took place during the strike, and was not an offer of reinstatement for the reasons given above. I do not credit Williams' testimony in effect that Brown rejected a later offer of reinstatement if he could not have a job as a tile setter. It is unlikely that Brown, seeking work, would have rejected an offer to return to his former job. Instead, I conclude, Williams first told Brown that he did not have any work as a helper, and then Brown asked for work as a tile setter. Respondent Williams did not offer either job to Joseph Brown, and I therefore find that Respondents did not make him an individual offer of reinstatement.

I do not credit field superintendent Britt Williams' testimony about early offers to striker D. W. Brown because of the ambiguity of that testimony. I also note that any such conversations may have taken place during the strike, and in such circumstances could not have contained a valid offer of reinstatement. On the basis of D. W. Brown's testimony, however, I conclude that Respondent Williams did make an offer of reinstatement to him on 1 February 1986, and that he decided not to accept.

(ii) John W. Clark

I credit Clark's testimony that he personally offered to return to work immediately after the strike, and that Respondent Williams never offered him a job. I do not credit field superintendent Britt Williams' testimony about an alleged offer to Clark about 1 March 1986 "or a good bit after that" because of the vagueness of the time, the offhand and casual manner in which the asserted offer was made, and because Clark was the more believable witness.

(iii) Marshall Taylor

I credit Taylor's testimony that he personally asked Williams' president for work after the strike, that he was referred to field superintendent Winfrey, and that the latter told Taylor that there was no work. Winfrey's testimony that he never saw Taylor after the strike is unbelievable. The fact that Williams' president saw Taylor in his office and referred him to Winfrey is established by the company executive himself, and it is highly improbable that Taylor, seeking work, failed to see Winfrey. I accord no probative weight to Winfrey's vague comments about asserted misconduct by Taylor, nor to the recently invented allegation of absenteeism.[49]

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[49] During the General Counsel's case-in-chief, I granted the motion of Respondents' counsel to sequester witnesses, with the admonition that it was the responsibility of the parties to police the rule. Thereafter, Winfrey remained in the hearing room during the testimony of field superintendent Britt Williams. Respondents' counsel acknowledged responsibility, and the Charging Party moved to strike Winfrey's testimony in its entirety. Winfrey testified that his presence in the hearing during examination of another witness did not affect his own testimony, and I deny the Charging Party's motion. Nonetheless, this

(iv) Gary L. Thurman

Williams issued a "separation" notice to Thurman on 25 October 1985. notice indicated that it was for lack of work. I credit Thurman's testimony, partially corroborated by Winfrey and Kenneth R. Williams, that Thurman had been laid off in the past pending receipt of materials and equipment, and then recalled. I also credit Thurman's testimony that this was the reason for his "termination" on 25 October 1985, while working at the Macy's jobsite.

I conclude that Thurman was laid off rather than discharged on 25 October, and retained employee status up to and through the strike, from 19 November to its end on 19 December 1985 and thereafter. According to the employer's past practice, Thurman had a reasonable expectation of recall when the materials and equipment for the Macy's job arrived. *D. H. Farms Co.,* 206 NLRB 111 (1973). The period of time from Thurman's layoff to the beginning of the strike, less than a month, was consistent with past layoffs and recalls. The employer did not suffer any decline in business, and, indeed, continued its business during the strike. *Allstate Manufacturing. Co.,* 236 NLRB 155 (1978). Accordingly, Thurman retained employee status.

I credit Thurman's testimony that on three occasions beginning in January 1986, he asked field superintendent Winfrey for work, without success; I do

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breach of the rule is a factor to be assessed in determining Winfrey's credibility. *Zartic, Inc.,* 277 NLRB No. 171 (1986).

not credit Winfrey's denial that Thurman made these attempts, because he was a less believable witness.

(v) Bobby Brown

Both the General Counsel's and the Respondents' evidence with respect to Bobby Brown is unclear, and in some respects contradictory. I conclude, on balance, that Brown was discharged rather than laid off on 8 July 1985.

The "lack of work" reason on the only separation notice given to Brown is inconclusive, since Brown himself admitted that the Company sometimes gives such notices in order to permit a discharged employee to collect unemployment compensation benefits, and at one point said he did not know the reason for his "discharge." Although Winfrey's explanation of Brown's "separation" as a "discharge" for absenteeism is suspect because of the admitted inconsistency in company records on the asserted reason, and Winfrey's unreliability as a witness, Brown himself stated that Winfrey "got mad," said he was going to give Brown "his papers," and advised Brown to save his money because "things were going to get tough." This is the language of permanent termination rather than temporary layoff.

The determinative factor is the length of time, about 41/2 months, between Brown's last day of work and the time that the strike started. This was more than four times greater than Brown's prior layoff periods and those of other employees. There is no showing of lack of work in the summer of 1985. Indeed, Williams had almost the same complement of employees throughout

the summer. It is unlikely that the employer would have failed to recall Brown for so long a period of time, while employing the same complement of employees, if it had merely laid him off rather than discharged him.

I therefore find that Williams discharged Bobby Brown before the strike began. Accordingly, it had no obligation to reinstate him. *Shaw Industries, Inc.*, 255 NLRB 877, 881 (1981).

(vi) Robert P. McDaniel

Although McDaniel's view of the nature of the Union's offer to return to work was erroneous, this did not detract from his status as an employee, his right to reinstatement, or the fact that the Union's letter contained a valid offer on his behalf. Although McDaniel testified that he wanted to return when the Union had a contract, the issue of whether he would have rejected an offer of reinstatement in the absence of a contract is hypothetical, and can only be tested upon receipt of such offer. Accordingly, he was entitled to an offer of reinstatement.

(vii) George Jackson

The question with respect to Jackson is whether the job which he took with Goodyear during the strike invalidated the reinstatement rights which he acquired by virtue of the Union's offer to return to work with Williams made on his behalf and that of the other strikers. The issue is whether the job with Goodyear constituted "regular and substantially equivalent employment." *Brooks Research & Mfg., Inc.*, 202 NLRB

634, 636 (1973). With respect to this issue, the Board has stated as follows:

> The question of what constitutes 'regular and substantially equivalent employment' cannot be determined by a mechanistic application of the literal language of the statute but must be determined on an *ad hoc* basis by an objective appraisal of a number of factors, both tangible and intangible, and includes the desire and intent of the employee concerned . . . *Little Rock Airmotive, Inc.*, 182 NLRB 666 (1970).

Reversing the Trial Examiner's finding in *Little Rock* that two employees *had* found substantially equivalent employment, the Board noted that this finding gave no weight to the fact that the employees had expressed continuing interest in returning to their jobs *(id.)*.

In this case, Jackson continued to participate in union meetings because he was not sure how long his job at Goodyear would last. I conclude that Jackson was not sure that his position at Goodyear gave him as much job security as his work for Respondent Williams, and that the Goodyear job therefore did not constitute substantially equivalent employment. I also conclude that Jackson's attendance at the union meetings manifested his continued interest in a job with Respondent Williams.

As the Board recently reaffirmed, "[t]he burden of showing that a striker has obtained regular and substantially equivalent employment rests with the employer." *Salinas Valley Ford Sales, Inc.*, 279 NLRB No. 89, sl. op. p. 2 (1986). The Respondents have not

established that the Goodyear job was substantially equivalent to Jackson's former job, and, accordingly, the Goodyear job does not invalidate any rights to reinstatement which Jackson may otherwise have had.

Jackson's statement that he would not have returned to a job with a pay cut does not adversely affect his right to an offer of reinstatement, since the question of whether he would have accepted such offer is speculative and can only be tested by his receipt of an offer.

(b) Mosaic's employees

(i) Charlie Atkins

I credit Atkins' unrebutted testimony that on 1 April 1986 he asked Respondent Mosaic's President Mion for work, and that the latter replied that there was no work for Atkins to do.

(ii) Janice McIvor

I credit McIvor's testimony that she applied several times for reinstatement, beginning in January 1986, and was returned to work on 10 March 1986.

(iii) Alberta Morris

I credit Morris' testimony that she applied for work several times, beginning in January 1986 but never received an offer of reinstatement. I accord no weight to Thrower's hearsay testimony about a report from a foreman saying that reinstatement had been offered to Morris — the testimony was not even elicited to establish the truth of the report.

F. The Strikers Who Did Not Testify

1. Larry Durden, Errette Price, and Frederick Folsom

Seven of the alleged discriminatees did not testify.[50] As set forth above, the complaint alleges and the answer denies that Respondents failed to reinstate the alleged discriminatees.

Mosaic's Vice President Thrower testified without contradiction that strikers Larry Durden, Errette Price, and Frederick Folsom had been reinstated by Mosaic. Thrower's testimony is partially corroborated by company records which show that Durden was on the payroll for the first week of January 1986,[51] and Folsom was laid off on 17 September 1986.[52] Further, the complaint acknowledges that Errette Price was reinstated on 26 May 1986.

Accordingly, I find that Durden was reinstated the first week of January 1986, and Price on 26 May 1986. As for Folsom, he must have been first reinstated in order to be laid off on 17 September. I shall leave the date of his reinstatement to the compliance stage of this proceeding.

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[50] Frederick Folsom, Thomas Allen, Larry Durden, Lorenzo Kendrick, Larry B. Taylor, Errette Price, and Serlester Stanley.

[51] Jt. Exh. 2.

[52] Jt. Exh. 8.

2. *Thomas Allen*

Mosaic's Vice President Thrower testified that he decided not to rehire striker Thomas Allen because the latter, at a state unemployment compensation hearing, "went totally out of emotional and mental control" engaged in verbal abuse toward all parties and the presiding officer. Therefore, Thrower decided not to rehire Allen although he had had no previous trouble with him. The date of the unemployment compensation hearing is not indicated in the record, but it obviously took place some time after the end of the strike.

Neither the General Counsel nor the Charging Party contested Thrower's description of events at the unemployment compensation, and, accordingly, I accept his testimony that he decided not to rehire Allen for the reasons given.

3. *Lorenzo Kendrick*

Thrower's testimony establishes that Lorenzo Kendrick was an employee of Mosaic. Thrower said that he thought that Kendrick was working for another company, about whose name he was uncertain. Kendrick did not ask for reinstatement at Mosaic. However, the Union's offer of 20 December 1985 necessarily included Kendrick, and he was therefore entitled to an offer of reinstatement. Thrower's vague testimony about Kendrick's other job is insufficient to establish that Kendrick had found regular and substantially equivalent employment of a nature to invalidate his right to reinstatement at Respondent Mosaic. *Salinas Valley Ford Sales. Inc.*, supra.

4. Larry Taylor and Serlester Stanley

There is no testimony specifically pertaining to Taylor or Stanley, and any findings concerning them must be based on the pleadings and documentary evidence. As indicated above, the complaint alleges them to be discriminatees, the answer admits they are employees who ceased work, and record evidence shows that those employees were economic strikers. Taylor and Stanley were therefore included in the terms of the Union's offer to work, dated 20 December 1985.

Williams' records in 1985 establish that Taylor and Stanley were employees of that company before the strike.[53] The record also contains lists of Williams' employees from 6 December 1985 through 21 March 1986.[54] Neither Taylor's name or Stanley's name appears on any of these lists. However, since the complaint acknowledges that Taylor was reinstated on 13 January 1986, I accept that date as the date of Taylor's reinstatement. Since company records do not show Stanley's post-strike employment, I conclude that he was not reinstated, and there is no evidence that he was offered reinstatement.

G. Legal Conclusions with Respect to the Section 8(a)(3) Allegations

It is well established that economic strikers are entitled to immediate reinstatement upon an

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[53] Jt. Exhs. 9-14.

[54] Jt. Exhs. 15-30.

unconditional offer to return to work, provided that their positions have not been filled by permanent replacements and the employer does not have other legitimate and substantial business justification for refusal to reinstate them. *Hansen Brothers Enterprises,* supra. In order to establish that the replacements have been permanently employed, "the employer must show a *mutual* understanding between itself and the replacements that they are permanent" *(id.,* 279 NLRB No. 98 at sl. op. p. 3).

Summarizing the facts explicated above, Williams was employing far more replacement employees during and after the strike than the strikers who applied for reinstatement, and work was available at the time of application. The record is devoid of any evidence that Williams considered the replacements to be permanent, or that it had any such understanding with them. Williams' president candidly testified that he "didn't pay any attention" to the replacements. I find that none of the replacement employees at Williams had been permanently employed.

The evidence also shows that Mosaic had at least two replacement employees during the last pay period of December 1985 (after the end of the strike), more than eight for the first pay period in January 1986, and that work was then available. Respondent Mosaic's vice president was equally candid. He testified that he kept the jobs going with replacement employees until the jobs ended, and then "replaced" them, i.e., the replacement employees, with strikers. I find that the replacement employees at Respondent Mosaic had not been permanently employed.

The Union's letter of 20 December 1985 constituted an effective offer immediate return to work on behalf of all the alleged discriminatees. It was received by Mosaic on 22 or 23 December 1985, and by Williams on 27 December 1985. Because the Respondents had not employed any permanent replacements and had no other legitimate and substantial business justification, they were obligated to offer immediate reinstatement to all the alleged discriminatees except Bobby Brown, who had been discharged prior to the beginning of the strike. The normal period allowed by Board law for such reinstatement is 5 days from receipt of the reinstatement offer. *Pease Company,* 251 NLRB 540 (1980). Because the Union's letter in this case was received during the last week of the year, immediately prior to or between two holidays normally accompanied by plant shutdowns, I conclude that the date each Respondent was obligated to reinstate discriminatees was 2 January 1986.

The only employee immediately reinstated was Larry Durden, who was on Mosaic's payroll for the first week of January 1986. With respect to the others, the Respondents' failure to offer them immediate reinstatement violated Section 8(a)(3) and (1) of the Act. *Hanson Brothers Enterprises,* supra.[55]

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[55] In *Hanson,* the administrative law judge found that the union's demand for reinstatement of strikers was coupled with a demand that the striker replacements be discharged, and that this offer was not unconditional. In disagreement, the Board stated as follows:

Respondents' obligations to reinstate some of the discriminatees terminated on dates subsequent to 2 January 1986 — on 13 January 1986 with respect to Larry Taylor because he was then reinstated; on 1 February 1986 with respect to D.W. Brown because he then declined an offer of reinstatement: on 10 March 1986 with respect to Janice McIvor, because she was then reinstated; and on 26 May 1986 with respect to Errette Price because she was then reinstated. Such obligation also terminated with respect to Thomas Allen on the date of the unemployment compensation hearing in which he engaged in conduct of a nature to disqualify him. It also terminated on the date of reinstatement of Frederick Folsom. I shall leave the date of Folsom's reinstatement and the date of Allen's unemployment compensation hearing to the compliance stage of this proceeding.

It is well established that economic strikers are entitled to immediate reinstatement upon an unconditional offer to return to work, provided their positions have not been filled by permanent replacements (authority cited). Thus, where the striker replacements are only temporary, an offer to return to work which demands no more than the discharge of those replacements is perfectly appropriate. 279 NLRB No. 98 at sl. op. p. 2.

It is clear that the last sentence quoted above does not add a new requirement for the creation of a right to immediate reinstatement, i.e., a demand for the discharge of temporary replacements. Rather as appears in the context of the decision, a demand for their discharge does not thereby make the offer to return conditional in nature. The right of economic strikers to replacement, in the absence of permanent replacements or other legitimate cause, remains as it has been established by prior law.

H. The Alleged Refusal to Bargain

1. The bargaining request and the Respondents' responses

(a) Summary of the evidence

As set forth above, subsequent to various bargaining sessions, the Union's letter dated 20 December 1985 contained an averment that the parties had reached agreement on a contract, and that it should be reduced to writing for signature.[56] The complaint does not allege that the parties actually reached agreement, but, rather, that this letter constituted a request for further bargaining which Respondents did not honor. Respondents deny this.

Mosaic's Vice President Thrower told Business Manager Clowers, after receipt of the Union's letter in the last week of December 1985, that he saw no reason why the parties were refraining from signing an agreement, because the Union had accepted it. About a week later, in Clowers' conversation with Respondent Association Chairman Kenneth R. Williams, the latter did not voice his asserted belief that there was no contract. Instead, he said merely that he doubted that the Union represented a majority. Union agent Clowers asked Mosaic to call him back with a statement of position, and Williams promised to do so. However, neither Respondent had further communication with Clowers, nor did they answer the Union's 28 January

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[56] G.C. Exh. 3. As noted, the letter also contained an offer to return to work on behalf of the remaining strikers.

1986 letter advising them that the membership had ratified a contract.

Although Thrower denied that the parties had reached agreement, this denial was not made until the hearing. Thrower also agreed that "there could have been further discussions about (the open) items," and affirmed that such differences had been resolved in prior negotiations. The sole reason the parties did not continue bargaining in this case was the Respondents' asserted belief that the Union did not have a majority. Although Thrower denied that he considered the Union's 20 December 1985 letter to be an offer to resume negotiations (if there was no contract), he was contradicted on this issue by Association Chairman Kenneth R. Williams, who testified to the contrary.

(b) Legal analysis and conclusions

The Board has previously ruled on a similar issue presented in a prior case. In *Petropoulos Brothers Appliances*, 169 NLRB 1161(1968), the union, as here, sent a communication to the company accepting the latter's last offer, and requesting signatures on a written agreement. In language approved by the Board, the trial examiner, in relevant part, stated as follows:

> What the Union was saying to the Employer in its telegram... was that it was willing to accept what the Respondent had last offered to it. That fact remains unchanged no matter what term the Union may have used to describe the effect of its acceptance. And the fact that (the union agent) may have erroneously believed that acceptance of the Respondent's offer constituted a final

> agreement,...does not alter this conclusion. If further bargaining was required in the Respondent's opinion, it was obligated to say so; if it was not, it was obligated to meet with the Union, as the latter had requested, and sign a written memorial of the agreement. If, as the Respondent says, it believed that the Union was in error in thinking that a binding agreement had been achieved, its duty to bargain in good faith required that it so inform the Union and thus afford the latter an opportunity to change its position, if it so desired. Instead, as (the company attorney's) letter...indicated, the Respondent led the Union to believe that the latter's acceptance of the Respondent's offer was being taken under consideration and that the Union would thereafter receive a reply. But no reply was made...In view of these facts, I cannot agree that the Union did not request the Respondent to bargain...nor can I regard the Respondent's conduct...as consonant with its duty to bargain in good faith *(id.*,169 NLRB at 1167-1168).

I conclude that the Union's 20 December 1985 letter constituted an offer to resume bargaining if agreement had not been reached for the reasons stated in *Petropoulos Brothers.*[57] Respondents' conduct herein is essentially indistinguishable from that of the employer in that case. I further note that Association Chairman Kenneth R. Williams admitted that he considered the

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[57] See also *T.F. Frick & Co.*, 270 NLRB 459, at 461-462 (1984).

Union's letter to be an offer to resume bargaining.[58] The record is clear that there was no response.

2. *Evidence of disaffection with the Union among Williams' employees*

(a) summary of the evidence

Williams introduced two petitions stating that the signatories thereon did not wish to be represented by the Union. One contains 28 signatures, and the other six.[59] Neither petition is dated, nor are any of the signatures.

Elbert Stephens, a truckdriver for Williams, struck for about 2 or 3 days in late November 1985. Thereafter, he solicited the signatures on the petition with 28 names, and identified them as those of Williams' employees. Stephens testified that the petition was typed for him by a company secretary who works in the "front office." He then circulated it in early December 1985 among employees at company locations which he visited as a company truckdriver, and gave it to Kenneth Williams' son. He was uncertain about the date.

Stephens also identified the six signatures on the smaller petition as those of Williams' employees. He originally testified that he gave this petition to Kenneth

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[58] It is unclear whether it was the Union or Respondents who requested bargaining prior to the negotiations beginning in August 1985. If it was the Union, the latter's 20 December letter was simply a reassertion of the original demand *Oleson's Foods No. 4 Inc.* ,167 NLRB 543 (1967).

[59] R. Exhs. 3, 9, 10.

R. Williams' son in "January or February." However, Stephens agreed on cross-examination that his pre-trial affidavit, dated 21 April 1986[60] refers only to the larger petition, and that the smaller one had not been completed at that time.

Kenneth R. Williams testified that he received the larger petition in early January, when he returned from vacation. He also asserted that he received the petition with six names in the second or third week of January 1986. However, Williams admitted on cross-examination that his pre-trial affidavit, dated 13 March 1986,[61] refers only to the larger petition with 28 names. Williams claimed that this statement in his affidavit was an error because he also had the second petition in his file at the time he gave his affidavit. According to Williams, he found the second petition when preparing for the hearing in this case.

Kenneth R. Williams testified that he had about 40 unit employees at the time he received the petition with 28 names. However as shown above, Williams' records show that there were more than 75 employees working at jobsites, doing apparently unit work, in the first pay period for 1986.[62]

Association Chairman Williams agreed that he reached a "fixed" position the first week of January that the Union did not represent a majority based on

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[60] G.C. Exh. 7.

[61] G.C. Exh. 6.

[62] Supra, fn. 19.

the petition with 28, "rumblings through the shop," and the strikers who crossed the picket line to return to work. Asked whether the Union represented a majority of the Association's employees, i.e., those of both Respondents, Williams testified that he did not know.

(b) Factual analysis

In absence of rebuttal, I credit Elbert Stephens' testimony that the 28 names appearing on the larger petition are those of Williams' employees during the time period material herein. I also credit Kenneth R. Williams' testimony that he received this petition in the first week of January 1986. However, I do not credit Williams' assertion that he received the second petition in January 1986. Stephens admitted that the second petition was not even in existence as of 21 April 1986, and Williams' explanation for the lack of any reference to the second petition in his affidavit is unbelievable.

I do not credit Kenneth R. Williams' testimony that he had 40 unit employees at the time he told Business Manager Clowers that he doubted the Union's majority status, in the first week of January. For the reasons explicated above,[63] Williams' attempt to limit the size of the unit by pay rates is unpersuasive. All the evidence suggests is that Williams was paying nonunion employees at higher rates for doing the same unit work, and that the total size of the unit exceeded 75 employees.

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[63] Supra, section C.

3. *Evidence of disaffection with the Union among Mosaic's employees*

(a) Summary of the evidence

Mosaic introduced a document with a legend stating that the signatories do not wish to be represented by the Union. The document is dated 30 January 1986, and there are nine signatories.[64] Daniel M. Cason, a Mosaic truckdriver, identified the signatures as those of Mosaic employees and members of the Union. He said that the document was typed on 30 January , and that he obtained signatures thereafter. However, Cason could not recall, and at times appeared to deny, ever giving the document to the Company. Instead, he asserted that he gave it to a Board investigator.

Mosaic's Vice President Thrower claimed that he heard about the existence of the document from Cason about 20 to 25 January. Cason showed it to him, but Thrower was uncertain about the date, finally settling on February as the month he saw the petition. Cason brought it to him, and asked what to do with it. Thrower assertedly told him to hold on to it.

Thrower also testified that he and Williams discussed the Union during the first week of January, and decided on 7 January not to have any further dealings with it because it did not represent a majority of the employees. Thrower agreed that he had no knowledge of a petition among Mosaic employees at that time. The decision not to

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[64] R. Exhs. 11, 12.

recognize the Union was based in part on the number of strikers who returned to work before the end of the strike.

Mosaic had 31 employees during the pay period ending 8 January 1986 and 39 during the last pay period for that month.[65]

(b) Factual analysis

Because of the contradictions in Cason's and Thrower's testimonies, the evidence is insufficient to establish that Cason ever showed Thrower the petition. Even if he did so, this did not take place until over a month after the date, in early January, when Respondents had already refused to bargain with the Union. The employees listed on the document did not represent a majority of Mosaic employees at any relevant time.

4. *Legal conclusions on the alleged refusal to bargain*

It is well established that "[t]he existence of a prior contract, lawful on its face, raises a dual presumption of majority — a presumption that the union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract...The burden of rebutting this presumption rests...on the party who would do so."[66]

Accordingly, the Union presumptively represented a majority of the Association's employees at the time

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[65] Jt. Exh. 2.

[66] *Barrington Plaza and Tragniew, Inc.*,185 NLRB 962 (1970), enfd. denied on other grounds, sub nom. *NLRB v. Tragniew, Inc. and Consolidated Hotels of California*, 470 F.2d 669 (9th Cir. 1972).

Respondents refused to bargain with it in the first week of January, assertedly because it lacked majority status. The principal reasons advanced by Respondents to support this position are the three petitions signed by employees. However, the only relevant petition is the one with 28 names received by Kenneth R. Williams in the first week of January. The second Williams' petition could not have been received by the Company until several months later, and the Mosaic petition was received by that Company, if at all, subsequent to the refusal to bargain.

As described above, the appropriate unit established by the contract was a multiemployer unit composed of the employees of the only two members of the Association, Williams and Mosaic. In order to establish a good faith doubt of the Union's majority status, such doubt must apply to the multiemployer unit.[67]

It is obvious that the 28 employees listed on the one petition in existence when the refusal to bargain took place did not comprise a majority of the more than 100 employees in the multiemployer unit at that time (more than 75 for Williams, and more than 30 for Mosaic). The same result follows even if I accept Kenneth R. Williams' erroneous estimate of 40 Williams employees when he received the petition, since the 28 signatories do not comprise a majority of that number plus the 31 Mosaic employees. Finally, the Association could not have doubted the Union's majority status in the multiemployer unit since Chairman Kenneth R. Williams frankly

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[67] See *Young's Market Company*, 265 NLRB 687 (1982); *Jim Kelley's Tahoe Nugget*, 227 NLRB 357 (1976); *Neveda Lodge*, 227 NLRB 368 (1976).

conceded that he did not know its representative status with respect to that unit.

Additional reasons advanced by the Respondents for doubting the Union's majority status — "rumblings in the (Williams) plant," and the number of strikers who returned to work soon after the strike began—do not constitute objective evidence of loss of a union's majority status. *Pennco, Inc.*, 250 NLRB 716 (1980).

Accordingly, since the Respondents failed to resume bargaining pursuant to the Union's letter dated 20 December 1985, and have not provided sufficient justification for their failure to do so, I conclude that they thereby violated Section 8(a)(5) and (1) of the Act. I shall fix the date of the refusal as 3 January 1986, the date Clowers discussed the Union's letter with Association Chairman Williams, and was told by the latter that he doubted the Union's majority status.

I. Respondent's Discontinuance of Fringe Benefit Payments

As described above, the Respondents discontinued making fringe benefit contributions during the last week of November 1985. There had been no discussion of this discontinuance during the bargaining negotiations, and the parties had not reached an impasse on this subject.

Business Manager Clowers testified that he heard from union members in December 1985 that Respondents were not making fringe benefit contributions. Later, in the last part of January 1986, he received documentary evidence of this fact.

As the Board has recently stated, "[i]t is settled that an employer violates Section 8(a)(5) and (1) when it

unilaterally changes or discontinues existing terms and conditions of employment, including contributions to contractual fringe benefit funds—upon expiration of a collective bargaining agreement unless: (1) the union has waived bargaining on the issue; or (2) the parties have bargained to impasse and the unilateral change is reasonably encompassed by the employer's preimpasse proposals." *Buck Brown Contracting Co.*, 272 NLRB 951(1984).

Respondents, however, argue that a finding of a violation based on the discontinuance of fringe benefit payments is barred by Section 10(b) of the Act. As noted above, this charge was first made on 25 June 1986 in Case 10-CA-21850. The charge was withdrawn on the representation of Charging Party's counsel that the withdrawal had been requested by the Region in order to incorporate the charge in a later case. The charge was again made in Cases 10-CA-21572 and 10-CA-21573, both filed on 28 July 1986.

The Respondents argue that the effective date of the charge is 28 July 1986 because there is no record testimony regarding the withdrawal of the earlier charge, and that Business Manager Clowers' notice of the cessation of contributions in December 1985 warrants application of the provisions of Section 10(b).

However, as noted above, the charges in Cases 10-CA-21572 and10-CA-21573 were filed on 27 February 1986, and alleged that Respondents had engaged in an unlawful refusal to bargain and had violated the Act by "these and other acts."

The Supreme Court has concluded that the charge is not a formal pleading, and that its function is not to give the Respondents notice of the exact charges against him. This is the function of the complaint.[68] The Court of Appeals for the Fifth Circuit has concluded that "general allegations such as that the employer 'by other acts and conduct***interferred with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act'...are legally sufficient to cause inclusion of other acts if they are sufficiently related to the specific acts alleged." *NLRB v. Central Power & Light Company*, 425 F.2d 1318, 74 LRRM 2269 (5th Cir. 1970), enforcing 173 NLRB 287(1968).[69]

In this case the Respondents' unlawful discontinuance of fringe benefit contributions began in late November 1985 and continued up to and after their unlawful refusal to bargain on 3 January 1986, and their discriminatory refusal to reinstate strikers at that time. The violations were thus closely related in time, and were an integral part of the same pattern of unlawful activity against the Union. Accordingly, I find that they were fairly comprised within the charges filed on 27 February 1986.The section 10(b) defense is therefore without merit.[70]

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[68] *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959).

[69] Accord: *Gulf State Manufacturing, Inc. v. NLRB*, 579 F.2d 1298, 99 LRRM 2547 (5th Cir. 1978), enforcing as modified 230 NLRB 558 (1977); *The Proctor & Gamble Manufacturing Company v. NLRB*, 658 F.2d 968, 108 LRRM 2177 (4th Cir. 1981), enforcing as modified 248 NLRB 953 (1980).

[70] *City Cab Company of Orlando, Inc.*, __F.2d__, 122 LRRM 2392 (11th Cir. 1986), enforcing 273 NLRB 1344 (1985); *Ryder System, Inc.; Ryder Distribution Systems, Inc.; and DPD, Inc.*, 280 NLRB No. 118, fn. 2 (1986)

In addition, the discontinuance of fringe benefits was continuing when the 28 July 1986 charge was filed. Each such violation constituted a separate and distinct violation of Respondents' bargaining obligation. For this additional reason, Section 10(b) is not a defense. *Farmingdale Iron Works, Inc.*, 249 NLRB 98(1980).

I therefore conclude that, by unilaterally ceasing to make contributions to the Union's fringe benefit funds in late November 1985 after the expiration of the 1983-1985 collective bargaining agreement, the Respondents engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

In accordance with my findings above, I make the following:

CONCLUSIONS OF LAW

1. The Respondents, Tile, Terrazzo & Marble Contractors Association of Atlanta & Vicinity, Williams Tile Company, and U.S. Mosaic Tile Co. are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Tile, Marble & Terrazzo Finishers & Shopmen, Local Union #167, is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing on 2 January 1986 to reinstate, or offer reinstatement to, certain economic strikers,[71] by failing and refusing to reinstate, or offer

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[71] John W. Clark, George Jackson, Robert McDaniel, Carruth Price, Serlester Stanley, Charlie Atkins, Lorenzo Kendrick, Marshall B. Taylor, Gary L. Thurman, Joseph Brown, and Alberta Morris.

reinstatement to, other such strikers from such date until a later known date [72] and by failing and refusing to reinstate, or offer reinstatement to, still other such strikers from such date until an unknown date[73] where they had not been permanently replaced by other employees, the Respondents thereby committed unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

4. All employees of all members of aforesaid Respondent Association, to wit, employees of Respondents Williams Tile Company and U.S. Mosaic Tile Co., performing work specified in Article IV of a collective bargaining agreement between the parties entered into on 1 October 1983, and terminating on 30 September 1986, constitute a unit appropriate for collective bargaining within the meaning of Section 9(a) of the Act.

5. Beginning in late November 1985 and continuing thereafter, by unilaterally ceasing to make contributions to the Union's fringe benefit funds required by the aforesaid expired collective bargaining agreement, the Respondents thereby committed unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. At all relevant times the aforesaid labor organization has been, and continues to be, the exclusive representative of Respondents' employees in the unit described above in Conclusion 4.

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[72] Larry Taylor, until 13 January 1986; D. W. Brown, until 1 February 1986; Janice McIvor, until 10 March 1986; and Errette Price until 26 May 1986

[73] Frederick Folsom, and Thomas Allen—the latter until the date of an unemployment compensation hearing at which he appeared.

7. By refusing to recognize and bargain with the aforesaid labor organization as the collective bargaining representative of the employees designated in appropriate unit described above, the Respondents on 3 January 1986 and thereafter have engaged in, and are engaging in, an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act.

8. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Respondents have not committed any unfair labor practices except those designated herein.

THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action which will effectuate the policies of the Act.

Having found that the Respondents, beginning 3 January 1986 and continuing thereafter, have unlawfully refused to reinstate certain economic strikers,[74] I shall recommend that the Respondents be ordered to offer them reinstatement, and to make them whole for any loss of earnings they may have suffered by reason of Respondents' discrimination against them, such payment to be made on a quarterly basis in the manner established

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[74] Supra, fn. 67.

by the Board in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[75]

Having found that the Respondents have failed and refused to reinstate certain other economic strikers from 3 January 1986 until a later date,[76] I shall further recommend that the Respondents make them whole for any loss of earnings they may have suffered from such date until the date they were reinstated, or, in the case of Thomas Allen, until the date he appeared at an unemployment compensation hearing, in the manner described above.[77]

Having found that the Respondents, beginning in late November 1985 and continuing thereafter, unlawfully ceased making contributions to the Union's fringe benefit funds required by the expired collective bargaining agreement, I shall recommend that the Respondents be required to make their unit employees whole by paying all fringe benefit contributions, as provided in the 1983-1985 collective bargaining agreement, which have not been paid and which would have been paid absent the Respondents' unlawful discontinuance of such contributions,[78] and by

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[75] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[76] Supra fns. 68, 69.

[77] Because of the fact that Respondents Williams and Mosaic are both members of the same employer association, and are the only such members, an order applying to both of them, with respect to all discriminatees is appropriate. *NLRB v. Lipman Brothers, Inc.*, 355 F.2d 15, 61 LRRM 2193 (1st Cir. 1966), enforcing 147 NLRB 1342 (1964).

[78] Because of the provisions of employee benefit funds are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. I leave to the compliance stage the question of whether the Respondents must pay any additional amounts into the

reimbursing unit employees for any expenses ensuing from the Respondents' failure to make such contributions.

Having further found that the Respondents, beginning 3 January 1986 and thereafter, have refused to recognize and bargain with the aforesaid Union, I shall recommend that they be ordered to recognize and, on request, bargain with the Union as the representative of all employees in the aforesaid appropriate unit, and, if an understanding is reached, embody such understanding in a written, signed agreement.

The General Counsel has filed an extensive brief recommending that a visitorial clause be included in the remedial order. In *O.L. Willis., Inc.*, 278 NLRB No. 29 (1986), the Board in similar circumstances found it unnecessary to include such a clause. I reach the same conclusion herein.

I shall also recommend that the Respondents be required to post appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, I recommend the following:

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fringe benefit funds to satisfy the "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to the provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

ORDER[79]

Tile, Terrazzo & Marble Association of Atlanta & Vicinity, Williams Tile Company, and U.S. Mosaic Tile Co., their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Tile, Marble & Terrazzo Finishers & Shopmen, Local #167, or any other labor organization, by refusing to reinstate, or offer reinstatement to, economic strikers who have not been permanently replaced by other employees.

(b) Unilaterally ceasing to make contributions to the aforesaid Union's fringe benefit funds as required by an expired collective bargaining agreement.

(c) Refusing to recognize and bargain collectively concerning rates of pay, hours, and other terms and conditions of employment with the aforesaid Union as the established bargaining representative of their employees in the following appropriate unit:

> All employees of all members of Tile, Terrazzo & Marble Contractors Association of Atlanta & Vicinity, to wit, Williams Tile Company and U.S. Mosaic Tile Co., performing work specified in Article IV of a collective bargaining agreement

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[79] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

between the parties entered into 1 October 1983 and terminating on 30 September 1985.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Offer immediate reinstatement to John W. Clark, George Jackson, Robert McDaniel, Carruth Price, Serlester Stanley, Charlie Atkins, Lorenzo Kendrick, Marshall B. Taylor, Gary L Thurman, Joseph Brown, and Alberta Morris, and make them whole for any loss of earnings they may have suffered as a result of Respondents' unlawful failure to reinstate them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Make whole the following employees for any loss of pay they may have suffered as a result of Respondents' unlawful delay in reinstating them from 2 January 1986, the date they should have been reinstated, until 13 January 1986 in the case of Larry Taylor; until February 1986 in the case of D.W. Brown, until 10 March 1986 in the case of Janice McIvor ; and until 26 May 1986 in the case of Errette Price, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Make whole Frederick Folsom and Thomas Allen for any loss of any pay they may have suffered as a result of Respondents' unlawful delay in reinstating them from 2 January 1986, the date they should have been reinstated, in the case of Frederick Folsom to the date that he was reinstated , and, in the case of Thomas Allen, to the date

that he appeared at an unemployment compensation hearing.

(d) Make whole all unit employees for all losses they may have suffered as a result of Respondents' conduct found to be unlawful herein. This make-whole provision shall be implemented in accordance with the formula set forth above in the section of this Decision entitled "The Remedy."

(e) Make all benefit fund payments due or past due to the Union, as required by the 1983-1985 collective bargaining agreement, in the manner set forth above in the section of this Decision entitled "The Remedy."

(f) Recognize, and, upon request, bargain collectively with Tile, Marble & Terrazzo Finishers & Shopmen, local Union #167, as the exclusive bargaining representative of all employees in the appropriate unit described above, and, if an agreement is reached, embody such agreement in a signed written contract.

(g) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payments records, timecards, personnel records and reports, and all other records necessary to determine the amount of reimbursement and fringe benefit payments due under the terms of this recommended Order.

(h) Post at their respective facilities at Smyrna, Georgia and Norcross, Georgia, copies of the attached

notice marked "Appendix A."[80] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by Respondents' authorized representative, shall be posted by Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including places where all notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not found herein.

Dated, Washington, D.C. 25 March 1987

Howard I. Grossman
Administrative Law Judge

[80] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TILE, TERRAZZO & MARBLE CONTRACTORS ASSOCIATION OF ATLANTA & VICINITY AND ITS MEMBER WILLIAMS TILE COMPANY	:	Cases 10—CA—21572 10—CA—21573
TILE, TERRAZZO & MARBLE CONTRACTORS ASSOCIATION OF ATIANTA & VICINITY AND ITS MEMBER U.S. MOSAIC TILE CO.	:	
and	:	
TILE, MARBLE & TERRAZZO FINISHERS & SHOPMEN, LOCAL UNION NO. 167	:	
TILE, TERRAZZO & MARBLE CONTRACTORS ASSOCIATION OF ATLANTA & VICINITY AND ITS MEMBERS WILLIAMS TILE COMPANY AND U.S. MOSAIC TILE CO.	:	
and	:	Case 10—CA—21804
TILE, MARBLE & TERRAZZO FINISHERS & SHOPMEN, LOCAL UNION NO. 167	:	

ORDER DENYING MOTION FOR RECONSIDERATION

On December 16, 1987, the National Labor Relations Board issued a Decision and Order in this proceeding[1] in which it adopted with modifications, administrative law judge's findings and conclusions that the Respondents violated Section 8(a)(1), (3) and(5) of the Act.

Thereafter, on January 28, 1988, the Respondents filed a Motion for Reconsideration requesting that the Board reconsider its findings in light of the issuance of *John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987) enf. sub nom. *Ironworkers Local 3 v. NLRB* 843 F.2d 770 (3rd Cir. 1988). The General Counsel and the Charging Party filed briefs responding to and opposing the Respondents, motion.[2]

The Board has delegated its authority to this proceeding to a three-member panel.

We deny the Motion for Reconsideration because the Respondents seek to raise a defense that is now untimely. The Respondents contend in their motion that this proceeding is now governed by the principles of Section 8(f) of the Act as set forth under *Deklewa*. Such a defense, however, was not raised by the Respondents in their

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[1] 287 NLRB No. 79.

[2] The Respondents submitted a reply brief to the General Counsel's and the Charging Party's briefs and the Charging Party filed a statement opposing the Respondent's attempted submission. In view of our denial of the Respondents' motion for reconsideration, discussed below, we find it unnecessary to rule on the Charging Party's statement opposing submission of the reply brief.

exceptions to the decision of the administrative law judge.[3] In their exceptions and supporting brief, the Respondents failed to assert the existence of any issue under Section 8(f). Further, the Respondents did not refer to *Deklewa*, even though *Deklewa* had issued on February 20, 1987, prior to the administrative law judge's decision of March 25, 1987 in this proceeding.[4] Moreover, *Deklewa* already had issued over two months prior to the Respondent's filing of its exceptions and brief on May 4, 1987. Further, during the pendency of this case before the Board, between the filing of exceptions and the issuance of the Decision and Order on December 16, 1987, the Respondents did not attempt to assert the existence of any issues under Section 8(f). Indeed, the Respondents found it appropriate to assert the defense now raised only *after* the issuance of an unfavorable Decision and Order affirming the judge's findings that the Respondents violated the Act. In these circumstances, there are no "extraordinary circumstances" within the meaning of Section 102.48(d)(1) of the Board's

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[3] Because this proceeding was not pending before the Board on exceptions arguably raising an 8(f) issue when the decision in *Deklewa* issued, it is distinguishable from *Ron E. Savoia Construction Co.*, 289 NLRB No. 26 (June 17, 1988). See also *Yorkair, Inc.*, 297 NLRB No. 58 (Nov. 30, 1989) and *Howard Electrical and Mechanical, Inc.*, 293 NLRB No. 51 (Mar. 29, 1989). Member Cracraft, who dissented in *Savoia*, finds it unnecessary to distinguish that case.

[4] In their brief in support of exceptions, the Respondents contended that at the time they withdrew recognition from the Union there were sufficient objective considerations to conclude that the Union "no longer represented a majority of their employees"and "had lost its majority support." The Respondents did not contend that the bargaining relationship entered into was 8(f) in character until the filing of their Motion for Reconsideration.

Rules and Regulations which would justify granting the Respondents' motion.[5]

Accordingly, having duly considered the matter,

IT IS ORDERED that the Respondents' Motion for Reconsideration is denied

Dated, Washington, D.C., April 20, 1990

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Dennis M. Devaney, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

[5] In their motion, the Respondents also contend that, under *Deklewa*, employees who engaged in picketing to secure adoption of a successor agreement necessarily lost their status as employees entitled to the protection of the Act and, therefore, the Respondents did not violate Section 8(a)(3) and(1) by failing to offer reinstatement to returning strikers. As we have found that the Respondents did not timely raise their defense under 8(f), this contention need not be reached. Nevertheless, apart from the matter of timeliness, we note that under *Ryan Heating Co.*, 297 NLRB No. 91 (Jan. 31, 1990)and *NVE Constructors, Inc.*, 296 NLRB No. 165 (Oct. 1989), picketing to secure an 8(f) agreement is permissible when an employer has employees and the picketing meets the time limitations set forth in Section 8(b)(7)(C) of the Act.

APPENDIX E

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

29 U.S.C. § 152(3)

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . .

29 U.S.C. § 158(a)(1)

> It shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of rights guaranteed in section 157 of this title.

29 U.S.C. § 158(a)(3)

> It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any union organization . . . .

29 U.S.C. § 158(a)(5)

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 158(f)

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction industry employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later . . . .

29 U.S.C. § 159(a)

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

(2)

No. 91-637

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAMS TILE & TERRAZZO COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board abused its discretion in denying petitioner's motion for reconsideration to review a contention that could have been, but was not, made during the course of the administrative proceedings.

2. Whether substantial evidence supports the Board's finding that petitioner did not have a good faith doubt concerning the union's majority support among the unit employees.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-637

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 935 F.2d 1249. The decision and order of the National Labor Relations Board (Pet. App. 25a-105a) are reported at 287 N.L.R.B. 769.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1991. The petition for a writ of certiorari was filed on October 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Williams Tile & Terrazzo Co. installs tile, terrazzo, and related products. Its employees have been represented for approximately 20 years by Tile, Marble & Terrazzo Finishers & Shopmen, Local Union No. 167 (the Union). In 1983, petitioner and U.S. Mosaic Tile Co. formed the Tile, Terrazzo & Marble Contractors Association of Atlanta and Vicinity (the Association) for the purpose of representing the two companies in collective bargaining with the Union. The Association recognized the Union as the collective bargaining representative of all employees of its two member companies who performed work traditionally considered to be within the Union's work jurisdiction, and it entered into a two-year collective bargaining agreement with the Union effective from October 1, 1983 to September 30, 1985. Pet. App. 2a, 43a-44a.

In mid-August 1985, the Association and the Union began negotiations for a new contract. The negotiations were not fruitful, and on November 19, the unit employees began an economic strike. Thereafter, petitioner and Mosaic discontinued making contributions to the Union's pension and welfare funds. On November 24, 35 of petitioner's employees and 19 or 20 of Mosaic's employees returned to work. Pet. App. 3a, 45a-47a.

On December 20, 1985, the Union wrote to Kenneth Williams, petitioner's president and the Association's chairman, and agreed to accept the Association's last contract offer, subject to ratification by the unit employees. The Union also made an unconditional offer to return to work on behalf of the remaining strikers. Williams did not respond to the letter. When the Union finally reached him on January 3, 1986, Wil-

liams stated that he doubted that the Union represented a majority of the employees. No further bargaining occurred, and the Association did not respond to the Union's second letter of January 28, 1986, reiterating its acceptance of the Association's last contract offer. Pet. App. 55a-57a, 85a-86a.

2. The Union filed unfair labor practice charges with the Board. Pet. App. 40a-42a. The Board found, in agreement with the administrative law judge (ALJ), that the Association, petitioner and Mosaic violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by unilaterally ceasing to make contributions to the Union's benefit funds and by refusing to recognize and bargain with the Union. Pet. App. 26a, 92a-94a.[1]

At the hearing, Williams testified that he withdrew recognition of the Union on January 3, 1986, after having "reached a 'fixed' position the first week of January that the Union did not represent a majority based on the petition [signed by 28 employees who expressed lack of support for the Union], 'rumblings through the shop,' and the strikers who crossed the picket line to return to work." Pet. App. 89a-90a.[2]

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[1] The Board also found, in agreement with the ALJ, that the Association, petitioner and Mosaic violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by refusing to reinstate certain striking employees and delaying the reinstatement of others. Pet. App. 26a, 97a-98a. The court of appeals affirmed the Board's findings on those issues, *id.* at 23a-24a, and they are not involved here.

[2] The ALJ rejected petitioner's reliance on two other petitions—one signed by six of its employes and the other signed by nine of Mosaic's employees—because they had not been received at the time petitioner or Mosaic expressed doubt about the Union's support. Pet. App. 88a-89a, 91a, 92a. The

In rejecting petitioner's assertion of a good faith doubt that the Union continued to represent a majority of the unit employees, the ALJ pointed out that Williams' evidence concerned only his own employees, and that Williams conceded that he did not know whether the Union maintained its majority status in the Association-wide unit.[3] The ALJ pointed out that the 28 employees listed on the timely petition did not comprise even a majority of Williams' 75-plus employees, much less the 100-plus employees in the combined bargaining unit. Pet. App. 93a. And the Board, citing its decision in *Buckley Broadcasting Corp.*, 284 N.L.R.B. 1339 (1987), noted that petitioner had "not proffered sufficient evidence" that the returning strikers had repudiated support for the Union and therefore had not "rebutted the overall presumption of continuing majority status." Pet. App. 26a-27a n.2.

ALJ found that "[t]he second Williams petition could not have been received by [petitioner] until several months [after the first week in January], and the Mosaic petition was received by that Company, if at all, subsequent to the refusal to bargain." *Id.* at 93a. Williams could identify only four employes who he heard had expressed dissatisfaction with the Union, and he was aware that all four had signed the 28-employee petition. Tr. 227.

[3] The ALJ found (as the unfair labor practice complaint alleged and petitioner admitted in its answer) that the appropriate unit for assessing majority status was the combined unit of petitioner's and Mosaic's employees. Pet. App. 93a. The ALJ further found that the total employee complement on January 3, 1986, was in excess of 100, consisting of more than 75 individuals employed by petitioner and 30 employed by Mosaic. *Ibid.* In so finding, the ALJ rejected petitioner's argument that only 40 of the employes on its payroll during the relevant period were unit employes. *Id.* at 47a-50a, 89a.

The Board's decision issued on December 16, 1987. On January 28, 1988, petitioner moved for reconsideration in light of *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375 (1987), enforced *sub nom. International Ass'n of Bridge Workers, Local No. 3* v. *NLRB*, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988), which altered the Board's approach to those bargaining relationships in the construction industry that are based on Section 8(f) of the Act, 29 U.S. 158(f), rather than Section 9(a), 29 U.S.C. 159(a).[4] The Board denied the motion for reconsideration. Pet. App. 106a-109a. It noted that *Deklewa* issued on February 20, 1987, at

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[4] Section 8(f) of the Act authorizes employers and unions in the construction industry to enter into exclusive bargaining agreements before an employee complement is hired and without regard to the union's majority status. Prior to *Deklewa*, the Board held that a Section 8(f) bargaining relationship could be repudiated by either party, at any time and for any reason; however, if the union gained majority status among the employees in the unit, the relationship would "convert" to a conventional bargaining relationship under Section 9(a), and the union would thenceforth gain the benefit of the presumption of continuing majority support accorded to such a relationship. See *Deklewa*, 282 N.L.R.B. at 1378-1379. In *Deklewa*, the Board rejected the doctrine of conversion; instead, it held that the Section 8(f) agreement is enforceable during its term, but held that either party could repudiate the relationship upon expiration of the agreement unless the union had been certified as the majority representative in a Board election or the employer had voluntarily recognized the union based on an affirmative showing of majority support. 282 N.L.R.B. at 1377-1378, 1385, 1387 n.5.

If *Deklewa* applied to this case—and if the expired contract between the Association and the Union in this case was a Section 8(f) contract—the Union would not have been entitled to a presumption of majority support when petitioner refused recognition. The Union instead would have been required to establish its support among the unit employees.

a time when this case was still pending before the ALJ, yet petitioner and the other respondents before the Board did not raise a Section 8(f) defense before the ALJ and did not refer to *Deklewa* or identify any issue under Section 8(f) in their exceptions to the ALJ's March 25, 1987, decision. Instead, the Board noted, petitioner and the other Board respondents had continued throughout the pendency of proceedings before the Board to defend their withdrawal of recognition on the distinct ground that the Union had lost its majority status, and "found it appropriate to assert the [*Deklewa*] defense * * * only *after* the issuance of an unfavorable [Board] Decision and Order." Pet. App. 108a. The Board rejected the assertion that its decision to apply *Deklewa* retroactively to "all pending cases at whatever stage of litigation" (*Deklewa*, 282 N.L.R.B. at 1389) required it, *sua sponte*, to examine whether a presumption of majority status was appropriate in this case.[5]

3. The court of appeals enforced the Board's order. Pet. App. 1a-24a. Initially, the court sustained the Board's position that the "assertion of section 8(f) issues in this case constituted an affirmative defense, and, as such, should have been presented at the first feasible stage after *Deklewa* issued." Pet. App. 17a. The court further found that the Board had not abused its discretion by refusing to consider the *Deklewa* issue for the first time on petitioner's motion

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[5] The Board distinguished *Ron E. Savoia Construction Co.*, 289 N.L.R.B. 200 (1988), noting that when *Deklewa* issued, that case was pending on exceptions to the Board that arguably raised the defense that the union enjoyed only a Section 8(f) relationship when the employer withdrew recognition. Pet. App. 108a n.3.

for reconsideration. *Id.* at 18a. The court explained (*id.* at 15a n.10):

> Although it is possible that in some cases the Board should apply [Section] 8(f) absent a Section 8(f) argument by either party, the facts of this case do not warrant such a conclusion. Both the Employers and the Board originally considered this case to be governed by [Section] 9(a). This dispute could reasonably be seen as a Section 9(a) dispute, and we do not read the facts to indicate that the Board was compelled to recognize the possible application of [Section] 8(f). It was therefore up to the parties to raise [Section] 8(f) in this case.

Accordingly, the court agreed with the Board that its policy of applying *Deklewa* retroactively did not require the Board, *sua sponte*, to consider whether the bargaining relationship in this case was governed by Section 8(f), rather than Section 9(a), in the absence of a claim that a Section 8(f) relationship existed. Pet. App. 13a-15a & n.10.

Next, the court found that the Board's findings on the refusal-to-bargain issue were supported by substantial evidence. The court noted that there was no issue here "regarding whether the Union in fact had lost majority status. The sole issue presented * * * by petitioner[] regarding the refusal to bargain is simply whether the Board incorrectly ignored the totality of the evidence supporting the Employers' good faith belief that majority status had been lost." Pet. App. 20a. Citing its own prior decision in *Bickerstaff Clay Products Co.* v. *NLRB*, 871 F.2d 980 (11th Cir.), cert. denied, 493 U.S. 924 (1989), the court rejected petitioner's reliance on the abandonment of the strike by a number of strikers, stating that "[s]trikers re-

turning to work can only support a good faith belief of lost majority when combined with other evidence." Pet. App. 21a. Here, the court found that, "even when combined," the factors relied upon by petitioner —the return of the striking employees, the petitions, and the "rumblings through the shop"—were insufficient to support a claim of good faith doubt of majority status. *Id.* at 21a-22a.

ARGUMENT

After a collective bargaining agreement has expired, a union that has been selected in a Board-conducted election or voluntarily recognized based on a showing of majority support enjoys a rebuttable presumption of continuing majority support. An employer can rebut the presumption and lawfully withdraw recognition only by demonstrating that, on the date recognition was withdrawn, (1) the union, in fact, had lost the support of a majority of the bargaining unit employees, or (2) the employer had a good faith doubt, based on objective considerations, of the continued existence of majority support for the union. *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549-1550 (1990). However, as noted above (see note 4, *supra*), under the Board's rule in *Deklewa*, no presumption of majority support exists at the expiration of a collective agreement entered into pursuant to Section 8(f) of the Act. Petitioner challenges both the Board's finding that it did not have a good faith doubt of the Union's majority support and the Board's refusal to reconsider the case under *Deklewa* to ascertain whether the expired agreement was a Section 8(f) contract. No issue warranting review by this Court is raised by either challenge. The court of appeals correctly concluded

that the Board's factual findings are supported by substantial evidence, and its decision does not conflict with any decision of this Court or of another court of appeals.

1. In *Deklewa*, the Board determined to apply retroactively "to all pending cases in whatever stage" its new policy that either party to a Section 8(f) agreement could repudiate the relationship at the expiration of the agreement, unless the union had been recognized based on a demonstration of majority support. 282 N.L.R.B. at 1399. Petitioner contends (Pet. 14-18) that the Board failed to follow its own rule in declining to review this case under *Deklewa* since it was still pending before the Board when petitioner filed its motion for reconsideration. However, the Board, upheld by every court that has reviewed the matter, has held that it will consider the issue whether the employer's relationship with the union is governed by Section 8(f) only if that issue is timely raised in a pending case. *Yorkaire, Inc.*, 297 N.L.R.B. No. 58 (Nov. 30, 1989), slip op. 2, enforced, 922 F.2d 832 (3d Cir. 1990) (Table) (*Deklewa* issue not timely where it could have been raised at ALJ hearing, but was raised for first time in exceptions to Board); *Howard Electrical* v. *Mechanical, Inc.*, 293 N.L.R.B. 472, 473 n.5 (1989), enforced, 931 F.2d 63 (10th Cir. 1991) (Table) (*Deklewa* issue not timely where not raised before ALJ or in exceptions to Board); *White-Evans Service Co.* v. *NLRB*, 285 N.L.R.B. 81 (1987), slip op. 10-11, enforced, 886 F.2d 333 (7th Cir. 1989) (Table) (Board did not abuse its discretion by denying employer's motion for reconsideration of a decision issued five months after *Deklewa*, where employer, as here, failed to raise the issue until after an unfavorable Board decision). See

also *Fox Painting Co.* v. *NLRB*, 919 F.2d 53, 56 (6th Cir. 1990) (Board properly declined to apply *Deklewa* retroactively where raised for first time in compliance proceedings); *Corson and Gruman Co.* v. *NLRB*, 899 F.2d 47, 49-50 (D.C. Cir. 1990) (untimely motion for reconsideration).[6]

The court below correctly concluded that it was "entirely reasonable" (Pet. App. 19a) for the Board to require the parties to present their arguments on the applicability of *Deklewa* to the Board at the first feasible stage after *Deklewa* was decided. This rule "promotes the agency's fair and efficient administration of the Act" by avoiding "the sandbagging effect of one party waiting to see if a decision is favorable and then, if it is not, raising new arguments." *Ibid.*

Moreover, as the court below further concluded, "the Board's application of this rule in this case [did not constitute] an abuse of discretion" (Pet. App. 19a): petitioner could have raised its Section 8(f) claim with the ALJ before whom the case was pending when *Deklewa* issued, or with the Board in its exceptions to the ALJ's decision. Petitioner, however, waited to raise the issue until after it had lost under the alternative theory it presented to the Board. The court below properly sustained the Board's refusal to entertain petitioner's effort to raise the issue at that

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[6] Petitioner's assertion (Pet. 16-17) that the Board did not follow that policy in *Ron E. Savoia Construction Co.*, 289 N.L.R.B. 200 (1988), is incorrect. As the Board explained in *Yorkaire*, slip op. 3 n.3, and in this case, Pet. App. 108a n.3—and as the court below reiterated, *id.* at 16a-18a—*Savoia* was pending on exceptions arguably raising an 8(f) issue when *Deklewa* issued, and *Deklewa* was brought to the Board's attention at the first possible stage of the litigation.

point.[7] The Board's regulations governing reopening, which were issued pursuant to its discretionary reopening authority under Section 10(d) of the Act, 29 U.S.C. 160(d), provide that a motion to reopen be based on "extraordinary circumstances" and must be filed within 28 days of the Board's decision. 29 C.F.R. 102.48(d)(1) and (2). Petitioner cites no "extraordinary circumstances" that warranted reopening to allow a belated presentation of the *Deklewa* issue.

Finally, and contrary to petitioner's assertion (Pet. 15), it is not true that the expired collective agreement here "is indisputably a section 8(f) agreement." The Union had a relationship with petitioner for more than 20 years; if petitioner had voluntarily recognized the Union during that period based on a showing of majority support, the expired collective agreement would not be a Section 8(f) agreement, but a Section 9(a) agreement, which gives rise to a presumption of majority support. Although Section 8(f) agreements are *permissible* in the construction industry, it does not follow that every agreement in that industry actually *is* such an agreement. Thus, the fact that petitioner was in the construction industry does not suggest that the Board should have raised the *Deklewa* issue *sua sponte*.

For the foregoing reasons, and in light of the uniform appellate rulings cited above, the manner in

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[7] As this Court has repeatedly held, a court may not order reopening of administrative proceedings except "in the most extraordinary circumstances," *INS* v. *Abudu*, 485 U.S. 94, 107 n.11 (1988) (quoting *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974)), upon "a showing of the clearest abuse of discretion." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535 (1946).

which the Board resolved the question in this case concerning the retroactive application of its own *Deklewa* decision does not present any issue of continuing importance warranting review by this Court.

2. Petitioner contends that, in finding that it had no good faith doubt of the Union's majority status, the Board and the court of appeals failed to assess the totality of the evidence (Pet. 18-21), required petitioner to establish the Union's actual loss of majority support rather than only a good faith doubt about such loss (Pet. 21-24), and improperly evaluated the impact on majority status of replacement workers (Pet. 24-29). There is no merit to any of these contentions.

a. The court of appeals expressly found (Pet. App. 21a-22a) that "even when combined," the factors relied upon by petitioner did not establish a good faith doubt. Petitioner simply quarrels with that conclusion, asserting (Pet. 18-20) that the return of striking employees, the 28 signatures on the petition, informal expressions of anti-Union sentiment, subsequent petitions, and the Union's cessation of the strike, supported its assertion of a good faith doubt. This contention—as petitioner acknowledges in urging this Court to "determine that the Board's finding is not substantially supported by the evidence as a whole" (Pet. 23)—raises only an evidentiary issue, which is not appropriate for further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, there was ample support for the Board's finding, which the court below upheld, that the factors cited by petitioner were not sufficient to establish a good faith doubt of the Union's majority status. As the court below pointed out, the fact that a majority of the strikers returned to work within a

few days of the strike does not itself reflect a rejection of the Union. Moreover, the petition that petitioner subsequently received listed the names of only 28 employees in a multi-employer unit of more than 100 employees, and the two other petitions signed by 15 additional employees were received only after the withdrawal of recognition. Finally, the oral statements by some employees, which amounted to "rumblings through the shop," were too vague to support a good faith belief that the Union had lost majority support. Pet. App. 21a.

Petitioner's reliance (Pet. 20) on the Eleventh Circuit's own prior decision in *Bickerstaff Clay Products Co.* v. *NLRB*, 871 F.2d 980, cert. denied, 493 U.S. (1989), does not present an issue for this Court to resolve, *Wisniewski* v. *United States*, 353 U.S. 901 (1957), and is in any event misplaced. In *Bickerstaff*, the court of appeals acknowledged that "an employee's return to work during a strike does not by itself provide a reasonable basis for presuming that he has repudiated the Union as a bargaining representative." 871 F.2d at 988. Nor does the fact that substantial numbers of employees have resigned from the union. *Id.* at 989. However, in the circumstances of that case, which included picket line violence, breakdown of union leadership, union dormancy, and dissatisfaction with the union evidenced by unfair labor practice charges filed by employees against the union (*id.* at 986-987, 989, 993), the court held that there was "a composite showing of objective evidence" establishing a good faith doubt. *Id.* at 994. No such showing was made here. There was no strike violence; the Union was active and visible at the time petitioner withdrew recognition; and the 28 employees who signed the anti-Union petition were considerably

less than a majority of petitioner's own employees, much less the combined unit.

b. Petitioner asserts (Pet. 22-23) that the Board's rejection of its reliance on the 28 signatories on the decertification petition because they constituted less than a majority of the unit employees shows that it was required to establish that the Union had actually lost majority status, rather than that petitioner had a good faith doubt on that score. This contention is meritless. In *Curtin Matheson*, the Court explained that "[t]he Board's requirement of some objective evidence indicating replacements' opposition to the union does not amount to a requirement that the employer prove that the union *in fact* lacks majority status. To show a good-faith doubt, an employer may rely on circumstantial evidence; to show an actual lack of majority support, however, the employer must make a numerical showing that a majority of employees in fact oppose the union." 110 S. Ct. at 1550 n.8. Thus, while petitioner did not have to show that a majority of the employees had signed a decertification petition, it did have to show by circumstantial evidence a reasonable basis for believing that a majority of the employees no longer supported the Union. Petitioner did not meet that requirement by making a numerical showing with respect to significantly *less* than a majority of the unit employees.[8]

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[8] There also is no merit to petitioner's passing assertion (Pet. 23) that the Union in fact did not represent a majority of the employees. Petitioner relies on the two petitions received after it withdrew recognition and on a calculation of the number of unit employees that was expressly rejected by the ALJ (Pet. App. 47a-50a). Its assertion simply takes issue with the Board's and the court of appeals' rejection of its evidence in those regards. As the court of appeals correctly

c. Finally, petitioner contends (Pet. 24-29) that the Board did not take into account the "large contingent of replacement workers." This contention simply takes issue with the Court's decision in *Curtin Matheson*, which upheld the Board's rule that, in determining whether an employer has a reasonable basis for doubting a union's majority status, no presumption is warranted as to whether or not striker replacements support the union. Petitioner suggests no reason why the Court should depart from the doctrine of *stare decisis* and overrule its recent decision in *Curtin Matheson*—and, indeed, petitioner does not urge the Court to do so. See Pet. i, 29.

That issue would not be properly presented here in any event. Before the Board, none of the respondents raised any issue concerning replacement employees, as distinguished from returning strikers, in seeking to show that they had a good faith doubt as to the Union's majority status.[9] Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner demonstrated no "extraordinary circumstances" that would excuse

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noted (*id.* at 20a), there was no issue here "regarding whether the Union in fact had lost majority status."

[9] Before the court of appeals, petitioner, for the first time in its reply brief, argued (at 12-13) that "[t]here is no evidence that the replacements would support the Union and, because [the court of appeals] has rejected any such presumption, for purposes of determining a majority the number of unit employes should be reduced by the number of employees 'inferred' by the ALJ to be replacements." The court of appeals did not respond to that new argument.

its failure here. Accordingly, the issue is not properly presented. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311 & n.10 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

DECEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45206